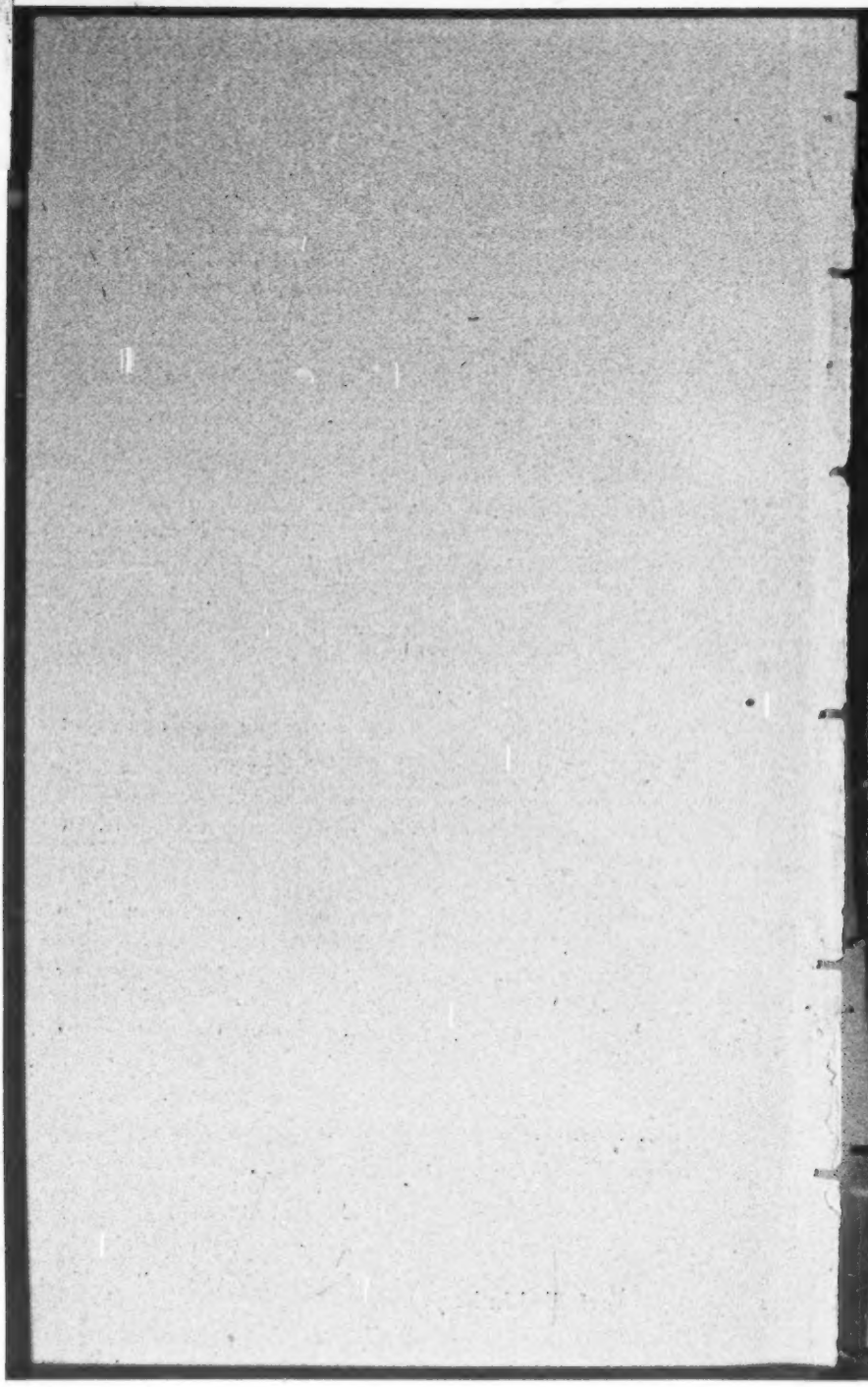

No. 491.

MARTIN B. BROWN CO., Printers, 9 to 17 Park Place, N. Y.
(7740b)

FILED
DEC 6 1901
JAMES H. MCKENNEY,
Clerk.

Brf. of Sterling for Petitioners.

[REG. 49, FOL. 414.]

Filed Dec. 6, 1901.

# In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,
Petitioners,

*against*

SAMUEL PINE and FREDERICK MULLER,
Respondents.

491

**Statement and points by the Corporation Counsel of the City of New York in behalf of the petitioners on an application for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

The decision of the Circuit Court of Appeals for the Second Circuit was rendered on October 30, 1901. This decision was by a divided Court. Judge Thomas wrote the prevailing opinion, Judge Wallace concurring, while Judge Wheeler wrote a dissenting opinion which

sustained fully the position taken by the petitioner, the City of New York.

The gist of the action is to restrain the City of New York from diverting a part of the water of the Byram river from its natural channel into the reservoirs and water supply of the City. The diversion or intended diversion takes place in the State of New York, where the stream has its origin. It eventually flows into Connecticut, and the complainants bring their action as citizens of that State.

As the matter now stands, the City is under a perpetual injunction in the broadest terms absolutely prohibiting it from using any part of the West Branch of the Byram river for its water supply, although all of said West Branch above the point of diversion is entirely within the State of New York, where the said West Branch has its origin. The diversion of this stream has taken place under the authority of certain statutes of the State of New York, purporting to give authority to the City of New York to do the acts complained of.

Large sums of money have been expended by the City of New York in the construction of dams and reservoirs intended to store the water and convey it to the city for public use, relying on the efficacy of these statutes. It has also expended large sums of money in compensating people similarly situated to the complainants for damages they have suffered. It is willing to compensate the complainants for any damages that they have suffered, provided such damages can be agreed upon or ascertained through any competent tribunal.

The complainants, however, insist that they are entitled as of right to a perpetual injunction restraining the said diversion, and will not accept compensation

for damages they may have suffered. Being citizens of Connecticut, they claim that the laws of New York State have no application, and that the contest is really between an upper and lower riparian proprietor, who are both private citizens.

The contest, however, is vastly more important. It relates to public matters of the gravest importance.

If this injunction is to be sustained the following proposition must be held to be true: There is a large amount of property or property rights in a State which are not subject to the exercise of the right of eminent domain by that State, but there is an easement or servitude attached to the same, held or owned by the citizens of another State, which the first State is powerless to do away with, and which render the said property or property rights within its own territory unavailable for itself or its own citizens. In other words, the State in which the said property and property rights are situted does not control the same, but another State or the citizens of that other State.

If the prevailing opinion in the court below is correct, then there is no means known to the law whereby a State can make use for the most necessary public purpose of the water of a stream arising in its own territory, if that stream eventually runs into another State. Any abutting land owner in the other State, no matter how little the diversion of the water may injure him, or perhaps if it does not injure him at all, can immediately enjoin the diversion.

The first State is absolutely powerless, no matter how liberally it may be willing to compensate the citizen of another State, no matter how complete a scheme it may provide through the courts for the payment of damages,—the property owner in the second State need pay no attention to that but may insist upon an injunction.

There would naturally be in a given case large numbers of people affected, some of whom would be very likely to insist upon such exhorbitant prices that it would be impossible or impracticable to settle with them.

The consequences of such a doctrine are evident. The instances through the country where a stream of water arises in one State and eventually flows into another State are legion. The result of the doctrine laid down by the Court below would be that the lower riparian owners in a foreign State absolutely control the use of water for public purposes of the upper riparian proprietors in another State.

A State in which water rises and flows for scores of miles would have no control even for public purposes of the said water, and could not pass laws which would allow diversion of any of this water even for public purposes.

In other words, cities, towns and villages would be unable to use the waters of their own State for purposes of drinking and cleanliness, extinguishment of conflagrations and for such other purposes as water is commonly used.

The laws of one State cannot, of course, authorize the use of the right of eminent domain to acquire title to property in another State, nor are there any laws of the United States which would have that effect.

In the present case the State of New York has done all that it is possible for a State to do in the way of authorizing the acquisition of the right claimed in this case, and has provided a scheme by which compensation must be paid, and the power of the courts, Federal as well as State, is sufficient to enforce payment of whatever damages the plaintiffs may have suffered.

If the decision below is correct then there is a class of property which is exempt from the exercise of the right of eminent domain, a class of property which there is no means of using for public purposes.

It is respectfully submitted that this result must logically follow from the decision of the Court below. A doctrine which arrives at this result we submit with much confidence should be thoroughly examined by the Supreme Court of the United States.

**We present to this Court the subject divided into five parts:**

## PART I.

This Consists of a Statement of Facts.

## PART II.

This Consists of a Concise Statement of the Principal Grounds on which we Claim that this Court should Grant the Writ of Certiorari.

## PART III.

This Consists of an Argument of the Legal Points Discussed and a Citation of Cases.

## PART IV.

This Consists of the Statutes of the State of New York Authorizing the City of New York to Exercise the Right of Eminent Domain, Applicable to the Present Case and is Also Called Appendix I.

## PART V.

This Consists of a Digest of all the Testimony and is also Called Appendix II.

## PART I.

THIS CONSISTS OF A STATEMENT OF FACTS.

## PART I.

**The following is a more detailed statement of facts:**

The main facts are simple and undisputed and this was true even upon the hearing below. The only dispute, in substance, in the Circuit Court, was whether there was any real damage to the complainants from the diversion of the water.

A digest of all the evidence is added to this brief as Appendix II.

The complainants themselves admitted that they had suffered no substantial damage, and at most the evidence of damage was very unsatisfactory and of an insignificant amount. We do not, of course, expect this Court to go into the question of whether or not there was actual damage, but shall assume the most that the complainants can claim to wit, that they did suffer a small amount of damage by the diversion of the water.

The complainants are citizens of and residents in the State of Connecticut, and owners in fee, respectively, of two farms situated in that State on the Byram river. The defendant is a municipal corporation of the State of New York, and as such a citizen of that State, so that the Court below acquired jurisdiction if at all by virtue of the fact that the parties were residents of different States.

The Byram river is a non-navigable stream of water flowing into Long Island Sound. Tracing its course upstream from the Sound, it for a distance forms the boundary between the States of New York and Connecticut, then deflects to the east and for some three or four miles is entirely within the State of Connecticut, during which it flows through or along the side of the two farms belonging to the complainants.

On the northern boundary of Mr. Muller's farm the river divides into two branches, the Eastern Branch being entirely within the State of Connecticut. Following the Western Branch upstream we soon come to the boundary line between the States of New York and Connecticut, beyond which line the said West Branch with all its ponds and tributaries is entirely within the State of New York. The City of New York, acting under authority of the Legislature of the State of New York at the time of the institution of the suit, was building a dam across the said West Branch entirely within the State of New York and about 700 feet from the Connecticut line, the effect of which dam when completed would be to divert a a part and at certain times perhaps all of the water of the said West Branch of the Byram river having its origin above the said dam from its natural channel into the pipes, reservoirs and water supply of the City of New York.

Such action would, of course, to some extent lessen the natural flow of the stream past the complainant's property, but the East Branch would be entirely uneffective and also part of the West Branch originating below the City's dam, so that the complainants could not be deprived of more than about one-quarter, as shown by the testimony, of the natural flow of the Byram river.

It is alleged that the complainants and each of them would be damaged to the sum of $2,400 and more by the alleged illegal diversion of the water, and hence they pray for an injunction restraining the defendant, its officers and agents, from building the said dam and from maintaining or continuing to maintain the same, and from diverting the water.

The defendant alleges that the intended diversion of the water would cause little if any injury and damage to

the complainants, and alleges in effect, that it has taken proceedings to acquire title to large quantities of land in the vicinity for constructing dams, aqueducts, reservoirs and other structures necessary for its supply of water, and has expended upwards of $30,000,000 in providing for said water supply. It avers that the dam will be of great and permanent benefit to the City of New York and its residents, and to all persons dwelling therein, and *avers that it is and always has been amply able and willing to pay any damages that the complainants may suffer from being deprived of the water that naturally comes from the said West Branch of the Byram river.*

THE DECREE OF INJUNCTION APPEALED FROM IS AS FOLLOWS:

"This cause came on to be heard at a Term of "the United States Circuit Court for the Southern "District of New York, and was argued by coun- "sel and thereupon, upon consideration thereof, "it is

"Ordered, adjudged and decreed as follows, to "wit:

"That the complainants in this suit and each of "them are entitled to the injunction order of this "Court restraining the defendant, its successors "and assigns, their and its officers, agents and em- "ployees, each, all and any of them, from diverting "the water or any part of the water of the West "Branch of the Byram river or any part of the "water of the Byram river, or in preventing in any "way said water or any part thereof, at any time "from flowing through its natural channel, before, "at and below the junction of the two branches of "said river; and it is further

"Ordered, adjudged and decreed that the de- "fendant, its successors and assigns, their and its

" officers, agents and employees, each, any and all of " them, be and they and each of them are hereby " perpetually enjoined from diverting the water or " any part of the West Branch of the Byram river, " or any part of the water of the Byram river, or " in preventing in any way said water or any part " thereof at any time from flowing through its nat- " ural channel, before, at and below the junction " of the two branches of said river, and it is further

" Ordered, adjudged and decreed, that a writ of " injunction do issue on the first day of November, " in the year nineteen hundred, against the defend- " ant, its successors and assigns, their and its " officers, agents and employees, and each, any and " all of them, commanding them to comply with " all and singular the premises, matters and things " so enjoined upon them, and it is further

" Ordered, adjudged and decreed, that the com- " plainants, and each of them, recover their costs " in the premises, to be taxed by the Clerk of this " Court.

" Dated July 24, 1900.

" N. SHIPMAN,
" Circuit Judge."

The injunction is thus in the broadest terms, and, if sustained, the City will be absolutely prohibited from using any part of the West Branch of the Bryan river for its water supply, although all of it above the dam is entirely within the State of New York, where the said West Branch has its origin.

Elaborate statutory provisions have been enacted by the Legislature of the State of New York, giving the City of New York the power to exercise the right of eminent domain, in order to secure the right to this water for the City's water supply.

Provision is made for the payment of damages, and, as appears by the testimony, large expenditures have been made for that purpose, and so far as appears, in a manner entirely satisfactory to the landowners within the State of New York, as well as to many landowners in the State of Connecticut who have been settled with privately.

It appears from the testimony that the City "has paid all damages for the diversion of the stream above the Connecticut State Line to this water right" (fol. 55). It also appears from the testimony that the City has settled with millowners and with parties who own land contiguous to the stream on both sides in the State of Connecticut, and has paid $379,000 for that purpose.

It also appears that the City has taken nothing but the use of the water. It has not attempted to condemn or take any land in the State of Connecticut. It also appears from the testimony that the cost of the dam in the State of New York alone without any of its appurtenances was about $49,000, and that the cost of getting the water to New York, that is, the building of the dam and the whole matter, would be upwards of $1,000,000.

If this injunction is to stand, all of this money has been thrown away, and its expenditure has been of no use to the City of New York. It means the loss of some $1,500,000, and a substantially diminution of its water supply, already inadequate.

The statutes of the State of New York authorize the exercising of the right of eminent domain cannot, of course, operate directly upon the land in the State of Connecticut so as to authorize the acquisition of title thereto, and hence both the City of New York and the State of New York are powerless to acquire by the exercise of the right of eminent domain the lands or water

rights, if any, that the complainants have in connection with their land in the State of Connecticut.

If this injunction is sustained then any State of the United States can be absolutely prohibited from using, even for its own purposes, or for the public purposes of any municipal corporation within its sovereignty, any non-navigable stream of water having its origin and flow entirely in that State, for the most necessary public purposes, if such stream eventually finds its way into another State whose landowners may, even in the slightest degree be injured by a diversion of the water, and indeed if they are not injured at all, as some assert.

No matter how liberally the State or City might be willing to compensate such landowners, it would be entirely at their mercy, and it does not need any great knowledge of human nature to enable one to see that such a power would be made use of in such a way as to practically prohibit the use of the water.

The City of New York in building this dam and diverting the water is acting under authority of the State of New York, and has the entire power of that State in the premises.

To say that the City of New York cannot build this dam and divert the water is equivalent to saying that the State of New York cannot do it.

*It is to be remembered that all we are contending for in this suit is that the special remedy by injunction shall not be enforced.*

We are not maintaining that the complainants have no action for damages. That is an entirely different proposition. We shall concede that the complainants are entitled to recover in an action in the courts of the State of New York, or in the Circuit Court of the United States whatever damages they can show they have sustained.

We contend that the complainants have not an absolute right to an injunction, that they cannot refuse to avail themselves of the other remedies which the law allows, and insist upon an injunction involving enormous pecuniary loss to the defendant and great public injury and inconvenience, the only loss or injury to themselves being small, and which can be easily compensated for in damages, which damages the defendants are willing and ready to pay.

It was written by the Supreme Court of Pennsylvania in *Robb* vs. *Carnegie*, 145 *Penn. St.*, 324, as follows :

> " *An injunction is not of right but of grace, and* " *will never be issued by a Court of Equity when it* " *will inflict a greater injury than it will prevent.* " *In such a case the injured party will be left to his* " *redress at law.*" (See under our Fourth Point below).

## PART II.

THIS CONSISTS OF A SHORT STATEMENT OF THE PRINCIPAL GROUNDS ON WHICH WE CLAIM THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

## PART II.

**The principal grounds on which we claim that the Court should grant a writ of certiorari are:**

(1) The United States Circuit Court of Appeals is not unanimous in its decision, Judge Wheeler dissenting therefrom and sustaining fully the position taken by the City, which is also sustained as we claim by decisions of Federal Courts in the First Circuit and by the Massachusetts Supreme Court (see under our Eighth Point).

(2) The subject-matter of the litigation is peculiarly within the province of the Supreme Court of the United States. While the suit is technically between citizens of one State and a municipal corporation of another State, it is in reality a suit by citizens of one State against another State, and we intend to argue as we did below that the Circuit Court was without jurisdiction. Indeed, it might be said that in some of its bearings the case is practically between two States, a dispute of which this Court has original jurisdiction.

(3) The questions involved are of great public importance. A similar situation may arise elsewhere in the State of New York, or in countless other places throughout the United States. The questions raised are, therefore, of general public interest and should be set at rest by this Court as a matter of public policy, and to avoid loss and litigation throughout the country. If the decision below is correct a class of property exists which is exempt from the exercise of the right of eminent domain.

(4) THE MATTERS INVOLVED ARE OF GREAT PECUNIARY IMPORTANCE TO THE CITY OF NEW YORK IN THIS PARTICULAR CASE. IF THIS INJUNCTION IS TO REMAIN IN FORCE THE CITY HAS LOST UPWARDS OF ONE AND ONE-HALF MILLIONS OF DOLLARS, UNLESS, INDEED, IT CAN "BUY OFF" THE COMPLAINANTS AND OTHERS SIMILARLY SITUATED, ON THEIR OWN TERMS AND WITHOUT ANY JUDICIAL DETERMINATION OF THE DAMAGES THAT THEY HAVE SUFFERED.

(5) THE MATTERS INVOLVED ARE OF GREAT IMPORTANCE TO THE CITY OF NEW YORK AND ITS CITIZENS, BECAUSE OF THEIR BEARING UPON OTHER PROJECTS FOR PROCURING AN ADDITIONAL WATER SUPPLY.

IF THE OPINION OF THE MAJORITY OF THE COURT BELOW IS CORRECT, THE CITY OF NEW YORK IS GREATLY RESTRICTED AS TO ITS SOURCES OF WATER SUPPLY, AND SOME OF THE MOST AVAILABLE CANNOT BE MADE USE OF BECAUSE THE STREAMS FLOW INTO OTHER STATES AND UNDER THE PRINCIPLES OF THE DECISION BELOW AN INJUNCTION WOULD IMMEDIATELY LIE TO RESTRAIN SUCH USE.

(6) THE VITAL QUESTIONS IN THIS CASE ARE NOVEL ONES. IT WAS CONCEDED BY COUNSEL FOR BOTH PARTIES BELOW THAT NO ADJUDICATION COULD BE FOUND THAT IF FOLLOWED AS A PRECEDENT WAS CLEARLY DECISIVE OF THE PRESENT CASE.

THERE IS NOW PENDING, WE ARE INFORMED, IN THIS COURT, A SUIT BETWEEN THE STATES OF COLORADO AND KANSAS INVOLVING VERY SIMILAR QUESTIONS TO THE ONES NOW UNDER CONSIDERATION, AND THE PETITIONERS RESPECTFULLY SUBMIT THAT THIS COURT SHOULD TAKE INTO CONSIDERATION THEIR CASE AS BEING INVOLVED WITH OR AS A PHASE OF THE QUESTIONS IN LITIGATION IN THE COLORADO AND KANSAS DISPUTE.

(7) IT IS SUBMITTED ALSO, WITH ALL DEFERENCE, THAT, A FUNDAMENTAL ERROR OF THE COURT BELOW EXISTS IN DECIDING THE CASE MAINLY AS IF IT WERE BETWEEN PRIVATE

INDIVIDUALS, AND AS IF QUESTIONS OF THE RIGHT OF EMINENT DOMAIN AND OF PUBLIC INTEREST WERE SUBSIDIARY. IT HAS NOT IN ITS OPINION FULLY TREATED THE GREAT PUBLIC QUESTIONS RAISED UNDER OUR FIFTH AND SIXTH POINTS BELOW, NOR THE QUESTION OF JURISDICTION, AND, FURTHERMORE, IT HAS, WE SUBMIT WITH ALL DEFERENCE, INSTEAD OF FOLLOWING THE DECISIONS OF THE MASSACHUSETTS COURTS AND THE DECISIONS OF THE FEDERAL COURTS ON QUESTIONS THAT HAVE ARISEN IN THAT AND ADJOINING STATES, DISTINGUISHED THEM FROM THE PRESENT CASE, AND THUS BROUGHT INTO CONFLICT THE DECISIONS OF THE FEDERAL COURTS IN THE FIRST CIRCUIT WITH ITS OWN DECISION IN THE SECOND CIRCUIT. IT IS OUR CLAIM THAT IF THE DECISIONS IN THE FEDERAL COURTS OF THE FIRST CIRCUIT AND IN THE MASSACHUSETTS STATE COURTS HAD BEEN FOLLOWED INSTEAD OF DISTINGUISHED, THERE WOULD HAVE RESULTED THE ADOPTION OF THE PRINCIPLES LAID DOWN BY JUDGE WHEELER INSTEAD OF THOSE LAID DOWN BY THE MAJORITY OF THE COURT.

## PART III.

THIS CONSISTS OF AN ARGUMENT OF THE LEGAL POINTS DISCUSSED AND A CITATION OF CASES.

## FIRST POINT.

**The Court below had no jurisdiction to grant the injunction. The Court has in effect assumed to enjoin a State at the suit of citizens of another State.**

As already stated, and shown more at length under our subsequent points, the State of New York in building this dam and diverting water is acting under authority of the State Legislature. It is not claimed that the City has done anything more than what the State has authorized it to do. The act complained of has been done within and upon the territory of the State of New York, and the State of New York has given, through its Legislature, all the power it can give to do the act complained of. What the City has done it has done as the agent of the State; that is, it is the act of the State itself, and hence this action should be treated as an action of the citizens of one State against the State itself. The fact that the State is not a party on the record makes no difference.

*In re Ayres*, 123 *U. S.*, 443, it was held that whether a State is an actual party within the meaning of the Eleventh Amendment of the Constitution is to be determined by a consideration of the nature of the case presented by the whole record, and not in every case by a reference to the nominal parties to the record, and numerous other authorities might be cited.

An injunction here means an injunction against the State of New York, forbidding it to exercise the right of eminent domain within its own limits on giving compensation. An injunction would only lie if the acts authorizing the exercise of the right of eminent domain were unconstitutional.

It might be suggested that under the clause in the Fifth Amendment to the Constitution of the United

States, to wit, no person shall * * * "be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation," a State statute which operated to deprive a person of his property without just compensation would be unconstitutional.

We think it clear, however, that under the said statutes of the State of New York, ample means are provided whereby the complainants in this case can secure adequate compensation. There are, first, the provisions of the Statute of 1877, which, we believe, of themselves would be ample to give the complainants an action for damages against the City of New York in the courts of the State of New York, through which they could recover sufficient compensation; or secondly, should the plaintiffs prefer to sue in the Federal courts, they could do so, and by virtue of their being residents of the State of Connecticut they could recover whatever damages to the Court should seem proper.

We think, further, that by virtue of common-law principles, independent of any statute, an action would lie in this Court for damages, which would afford adequate compensation.

Furthermore, we think that the complainants, having brought their action in the Circuit Court of the United States, and the defendants offering to submit to any mode of ascertaining damages that to the Court might seem proper, and to pay such damages, an injunction would not lie, at any rate, until after the damages shall have been ascertained and the City shall have refused, for a reasonable time, to pay the same.

The above propositions are involved in the discussion, and cases elsewhere in this brief, and we will not pursue them further here.

## SECOND POINT.

**We state under this head what we consider to be the common law relating to the diversion of water from a non-navigable stream, where there is no question as to governmental or public rights.**

The law is thus laid down by Chancellor Kent in volume 3 of his Commentaries, at page 439:

> "Every proprietor of lands on the banks of a "river has naturally an equal right to the use of "the water which flows in the stream adjacent to "his lands as it was wont to run (*currere solebat*) "without diminution or alteration. No proprie- "tor has a right to use the water to the preju- "dice of other proprietors above or below him, "unless he has a prior right to divert it or a "title to some exclusive enjoyment. He has "no property in the water itself, but a sim- "ple usufruct while it passes along. *Aqua currit* "*et debet currere ut currere solebat* is the language "of the law. Although he may use the water "while it runs over his land, as an incident to the "land, he cannot unreasonably detain it, or give it "another direction, and he must return it to its "ordinary channel when it leaves his estate. "Without the consent of the adjoining proprietors "he cannot divert or diminish the quantity of "water which would otherwise descend to the "proprietors below, nor throw the water back "upon the proprietors above without a grant, or "uninterrupted enjoyment of twenty years, which "is evidence of it."

This statement of the law is quoted with approval and stated to be undoubted, and to be the rule in those States

in the Union which have simply adopted the common law, in

*United States* vs. *Rio Grande Co.*, 174 U. S., 690 (1899).
*Atchison* vs. *Peters*, 20 Wall, 507.

An illegal diversion of water is technically a private nuisance, the remedy at common law being damages to be recovered in an action, in trespass on the case generally, and Courts of Chancery also have concurrent jurisdiction.

*Gardner* vs. *Newburg*, 2 Johns. Ch., 162.
*Merritt* vs. *Brinkerhoff*, 17 Johns 306.
*Crooker* vs. *Bragg*, 10 Wend., 260.
*Wadsworth* vs. *Tillotson*, 15 Conn., 366.

There are innumerable cases on the subject, but it is unnecessary in our judgment to refer to them at length.

There is no substantial difference between the learned counsel for the complainants and ourselves on this phase of the subject.

The principal cases have been cited in the late and important case of

*Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303 (1900). (Motion for reargument denied, 165 N. Y., 15.)

The following is from the opinion in the *Strobel* case :

" A riparian owner is entitled to a reasonable " use of the water flowing by his premises in a " natural stream, as an incident to his ownership " of the soil, and to have it transmitted to him " without sensible alterations in quality or un- " reasonable diminution in quantity."

" While he does not own the running water, he " has the right to a reasonable use of it as it passes

"his land. As all other owners upon the same "stream have the same right, the right of no one is "absolute, but is qualified by the right of others to "have the stream substantially preserved in its "natural size, flow and purity, and to protection "against material diversion or pollution. This is "the common right of all, which must not be inter- "fered with by any. The use by each must, there- "fore, be consistent with the rights of the others "and the maxim of *sic utere tuo* observed by all. "The rule of the ancient common law is still in "force: *aqua currit et debet currere, ut currere "salebat.*

"Consumption by watering cattle, temporary de- "tention by dams in order to run machinery, irriga- "tion, when not out of proportion to the size of the "stream, and some other familiar uses, although, in "fact, a diversion of the water, involving some loss, "are not regarded as an unlawful diversion, but are "allowed as a necessary incident to the use in order "to effect the highest average benefit to all the ripa- "rian owners. As the enjoyment of each must be "according to his opportunity, and the upper owner "has the first chance, the lower owners must submit "to such loss as is caused by reasonable use. Sur- "rounding circumstances, such as the size and veloc- "ity of the steam, the usage of the country, the "extent of the injury, convenience in doing business, "and *the indispensable public necessity of cities and "villages for drainage* are also taken into considera- "tion, so that a use which under certain circum- "stances is held reasonable, under different circum- "stances would be held unreasonable. It is also ma- "terial, sometimes, to ascertain which party first "erected his works and began to appropriate the "water" * * * (citing numerous cases).

"The question of reasonable use is generally a "question of fact, but whether the undisputed "facts and the necessary inferences therefrom "establish an unreasonable use is a question of "law."

* * * * * *

*"It does not follow from these views that if upon "another trial the facts are unchanged the defendant "and the other salt manufacturers will be compelled "to make such terms as they can, for a court of "equity with its plastic powers can require as a con- "dition of withholding a permanent injunction the "construction of a reservoir on the upper sources of "the stream to accumulate water when it is plentiful "for use in times of scarcity and thus neutralize the "diminution caused by the manufacture of salt. That "court may also require, on the like condition, "greater care in preventing the escape of salt water "and salt substances into the stream, as the defend- "ant attempted to do during the trial, and thus "prevent or minimize the pollution."*

It should be observed that some of the views expressed in the opinion in the *Strobel* case are not in harmony with the decisions of the Pennsylvania Supreme Court and of the Indiana Supreme Court.

See—

*Pennsylvania Coal Co.* vs. *Sanderson*, 113 Penn., 126 (1886).
*Robb* vs. *Carnegie*, 145 Penn., 324 (1889).
*Barnard* vs. *Sherley*, 135 Ind., 547 (1893).

We intend to return to the cases just cited hereafter.

## THIRD POINT.

**If this case were to be considered as between private individuals merely, the complainants should be left to their remedy at law, and the bill should be dismissed for want of equity, and under section 723 of the Revised Statutes. There is no satisfactory evidence of any damage. Until actual damage has been shown by the verdict of a jury, an injunction should not be granted.**

The early practice was that a bill in chancery would not be sustained to try and settle the legal right to a water course or to enjoin the use thereof, until after the legal right had been first settled in an action at law.

*Prentiss* vs. *Larned*, 11 Vt., 135 (1835).
*Marble and Slate Co.* vs. *Adams*, 46 Vt., 496 (1874).

The distinction between law and equity in such matters has been carefully preserved by the United States statutes relating to the Federal courts.

In the United States Revised Statutes, section 723, it is provided as follows:

> "Suits in equity shall not be sustained in either
> " of the courts of the United States in any case
> " where a plain, adequate and complete remedy
> " may be had at law."

It is true that this section is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy (*Boyce* vs. *Grundy*, 3 *Peters*, 210; *Tyler* vs. *Savage*, 143 U. S., 79, 95).

The said statute, however, shows a clear intent on the part of Congress that the remedies of equity should

not be allowed to supersede the common law. One of the objects of this statute was to insure the preservation of the right to a jury trial.

*Grether* vs. *Wright*, 75 *Fed. Rep.*, 742.
*In re Foley*, 76 Fed. Rep., 390.

It is to be observed here that many of the State court decisions, particularly those of New York, are not applicable as to the remedy by injunctions in this court because of the abolition of the distinctions between law and equity in pleading and practice.

"The remedies in the Courts of the United States "are at common law or in equity, not according to "the practice of State Courts but according to the "principles of common law and equity as distinguished "and defined in that country from which we derive our "knowledge of those principles, and although the "forms of proceedings and practice in the State Courts "shall have been adopted in the Circuit Court of the "United States, yet the adoption of the State practice "must not be understood as confounding the principles "of law and equity; nor as authorizing legal and "equitable claims to be blended together in one suit."

The above quotation is from *Thompson* vs. *Railroad Companies*, 6 Wall., 134; see also 1 *Desty Fed. Proc.*, p. 355.

This Federal statute, and the numerous decisions which might be cited thereunder, are important here, for the reason that the evidence as to actual damage is exceedingly vague and unsatisfactory, and if this injunction stands, the defendants have been deprived of a trial by jury on the question whether or not the complainants have suffered any damages (see digest of evidence on pp. 7–31 of this brief).

There is no doubt that the action would not lie without proof of damage (*Gould on Waters*, sec. 206). Furthermore, the City, having acquired the rights of all owners of rights to the water in the State of New York, has become itself, in effect, an owner, and entitled to such uses of the water as its predecessors had. It may well be that all of these predecessors together would have been entitled to divert all that the City diverts. A riparian proprietor has a right to the ordinary use of water flowing past his lands, including the use of the same for domestic purposes, such as drinking, washing, cooking, or for his stock. The City by succeeding to the rights of riparian owners has thus become entitled to a certain reasonable use of the water, even extending to the consuming of a reasonable quantity thereof, and it is therefore incumbent upon the complainants to show that such use of the water is unreasonable and also results in damage to them. Questions of this sort are peculiarly within the province of a jury—certainly in a case like the present one, where the evidence is of an exceedingly vague and shadowy character, upon which a jury might well find that no damage has been suffered by the complainants.

The following is from section 206 of *Gould on Waters*.

> "In view of the varying rights of different
> "riparian owners on the same stream, injunctions
> "should not be granted to regulate such rights
> "except in clear cases of intentional violation."

A good case illustrating this principle is *Earl of Sandwich* vs. *The Great Northern R. Co.*, *L. R.*, 10 Ch. Div., 707 (1878). This is the case of a railroad compano which took water from a stream for supplying its engines and for the general purposes of the station.

On a bill filed by a mill-owner lower down the stream, it appeared that the abstraction of water did no damage

in wet weather and never shortened the working of the mill for more than a few minutes a day. It was held that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and the quantity taken was reasonable.

This decision, however, is perhaps not entirely consistent with *Garwood* vs. *N. Y. C. & H. R. R. Co.*, 83 N. Y., 400.

The following cases may be cited on the proposition that whether a particular use of water is reasonable or not is a question of fact for a jury.

*Prentice* vs. *Geiger*, 74 N. Y., 341.
*Colrick* vs. *Swinburne*, 105 N. Y., 503.
*Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303.
*Bullard* vs. *Saratoga Victory Mfg. Co.*, 77 N. Y., 525.
*Wadsworth* vs. *Tillotson*, 15 Conn., 366.

*We call particular attention to the following case, to wit:*

*Parker* vs. *Winnipiseogee Co.*, 2 Black, 545 (1862).

This was a suit in equity to enjoin an alleged nuisance, consisting in interference with the flow of waters from a lake. The defendant corporation was attempting to secure more abundant and regular supply of water for the mills at Lowell and Lawrence, and this was to be accomplished by making the lake a vast reservoir of water, to be accumulated and maintained in wet weather, and to be drawn off and passed down the stream as it might be needed in dry weather. The defendant had bought up all the water rights relating to the lake, and had settled with numerous persons who claimed to be injured by the action of the defendants, and had offered the same amount to the plaintiffs, who refused the same, seeking to extort an unreason-

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able and unconscionable sum. The company had also spent large sums of money in improvements.

The following is from the opinion:

"We have failed to find those clear facts of right "upon one side and wrong upon the other, which "are necessary to quicken into activity the powers "of a court of equity. We forbear to pursue this "inquiry because the case presents another ground "free from doubt upon which we prefer to rest our "decision.

"It was urged at hearing, as an insuperable ob- "jection to the relief prayed for, that the appellant "has not established his right by an action at "law. The objection was not taken by demurrer "or in the answer. In the courts of the United "States, it is regarded as jurisdictional and may "be enforced by the Court *sua sponte*, though not "raised by the pleadings nor suggested by the "counsel. 2 Cr., 419; 5 Pet., 496; 2 How., 383.

"The 16th section of the Judicial Act of 1789 "provides 'that suits in equity shall not be sus- "'tained in either of the courts of the United States "'in any case where plain, adequate and complete "'remedy can be had at law.' This is merely de- "claratory of the pre-existing rule, and does not "apply where the remedy at law is not 'plain, "'adequate and complete'; or, in other words, "where it is not 'as practical and as efficient to "'the ends of justice and to its prompt administra- "'tion as the remedy in equity.' 3 Pet., 205. But "where the remedy at law is of this character, the "party seeking redress must pursue it. In such "case, the adverse party has a constitutional right "to a trial by jury. 19 How., 278. The concurrent "jurisdiction of courts of equity in cases of private

"nuisance, dates back to an early period in the "growth of the English equity system. * * * It "has been greatly enlarged since the time of Lord "Thurlow. * * * It is now too firmly established "to be shaken, but is not without limitation. It "is governed by the same principles which animate "and control its action in other cases where its "aid may be invoked against a wrongdoer. "Many cases of private nuisance will sustain an "action at law which will not justify relief in "equity. * * * A court of equity will interfere "when the injury by the wrongful act of the ad- "verse party will be irreparable as where the laws "of health, the laws of trade, the destruction of "means of subsistence or the ruin of property "must ensue. * * * It will also give its aid to "prevent oppressive and interminable legislation, "or a multiplicity of suits, or where the injury is "of such a nature that it cannot be adequately "compensated by damages at law, or is such as "from its continuance or permanent mischief must "occasion a constantly recurring grievance which "cannot be prevented otherwise than by an in- "junction * * * A diminution of the value of "the premises without irreparable injury is no "ground for interference. * * * *Where an in- "junction is granted without a trial at law it is "usually upon the principle of preserving the property "until a trial at law can be had.* A strong "*prima facie* case of right must be shown and there "must have been no improper delay. The "Court will consider all the circumstances "and exercise a careful discretion. * * * "Until the rights of the parties are settled at law "only a temporary injunction is issued to prevent "irreparable injury. * * * This jurisdiction "is applied only where the right is clearly estab- "lished—where no adequate compensation can be

"made in damages and where delay itself would "be wrong. * * * The case must be one of "strong and imperious necessity or the right must "have been previously established at law. * * * "If the evidence be conflicting and the injury "doubtful, this extraordinary remedy will be with- "held. * * * After the right has been estab- "lished at law a Court of Chancery will not, as of "course, interpose by injunction. It will consider "all the circumstances, the consequences of such "action, and the real equity of the case. * * * "He (the complainant) does not allege either "danger of irreparable injury, or of protracted "litigation, or of a multiplicity of suits as the "ground upon which he seeks relief in equity. "There is no warrant for such averment. If he "has been injured his injury can be ascertained "and fully repaired by damages in an action of "law. As a jury is the tribunal provided by law "to determine the facts and to fix the amount, "they can best perform this duty, The fact that "other proprietors have been paid bears upon "this point; 8 E. L. & E., 222-223. *The appellant "can have no standing in a court of equity until he "has laid this foundation for relief. This objection "is fatal to the case. We decide nothing else.*

"There are cases in which a court of equity will "take jurisdiction and give a complete remedy "without the previous intervention of a court of "law. * * * But this case does not belong to "that class."

Hence the decree of the Circuit Court dismissing the bill was affirmed.

Following the *Parker* case is

*Consolidated Canal Co.* vs. *Mesa Canal Co.*, 177 U. S., 296 (1900).

This was a suit to restrain the defendant from maintaining in its canal a dam in such a way as to impede the flow of water in complainant's canal or to destroy a certain water-power claimed by the complainant.

A part of the finding of the Court below was as follows:

"A further result of the erection of the water in "appellant's canal below the division gates was to "*very slightly, if at all*, impede the flow of water in "appellant's canal above the division gates and "thereby detract very slightly from the carrying "capacity of appellant's canal.

"The cost of the reconstruction of the canal from "Ayres' head gate to the division gates exceeded "ten thousand dollars, and the water power created "at the fall was about equal to about forty horse-"power."

BREWER, *J:*

"In view of the finding of the Supreme Court we "need not stop to consider any question in respect "to the influence of the dam placed by appellee "upon the flow of water in appellant's canal, and "this, notwithstanding the fact that in the trial of "the case much of the testimony, pro and con, was "in reference to that matter, we are concluded as "to the question of fact by the finding, *and it is* "*familiar law that injunctions will not issue to* "*enforce a right that is doubtful, or to restrain an* "*act the injurious consequences of which are merely* "*trifling.*

## FOURTH POINT.

**Still treating this case as between private individuals or corporations merely, an injunction should not be granted if the decisions cited below in the Supreme Courts of Pennsylvania and Indiana have adopted the correct principles of law.**

The Pennsylvania and Indiana Courts, and perhaps the courts of other states, have adopted certain principles, as shown in the cases cited below, which are not in harmony entirely with the New York decisions on certain points as stated by Judge Vann in

*Strobel* vs. *Kerr Salt Co.*, 164 Y. N., 303.

These principles were, however, adopted after elaborate argument and much difference of opinion among the judges and are entitled to great weight before this Court.

The doctrine of the Pennsylvania and Indiana Courts may be stated as follows generally:

The use and enjoyment of a running stream for domestic purposes by lower riparian proprietors must *ex necessitate* give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of a lawful business, as for instance, that of mining coal.

An injunction should not issue but persons should be left to their remedy at law.

> " *An injunction is not of right but of grace, and*
> " *will never be issued by a Court of Equity when it*
> " *will inflict a greater injury than it will prevent.*
> " *In such a case the injured party will be left to his*

"*redress at law*" (from opinion in Robb case, cited below.

The doctrine of the cases about to be cited applies *a fortiori* to the case before this Court, where vast public interests are involved, and where the injunction that has been allowed in effect forbids any State of the Union to use or authorize its own municipal corporation to use water, the most necessary thing to life next after air, if such use results in injury to a person owning lands in another State. Such person would hold in his own hands control of the resources of an entire State.

*Pennsylvania Coal Co.* vs. *Sanderson*, 113 Penn. St., 126 (1886).

This was an action on the case to recover damages for loss of a stream of water which flowed through the plaintiff's grounds and was rendered entirely useless for domestic purposes by the defendant's discharging the water into it, which they pumped from their coal mines. This was the fourth time the case had been before the Supreme Court of Pennsylvania, and the law involved was the subject of long argument and careful consideration.

A verdict for substantial damages was rendered in favor of the plaintiff, and the case came before the Supreme Court of Pennsylvania on a writ of error. This judgment was reversed. It was held that one operating a coal mine in the ordinary and usual manner, may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.

The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners who purchased their land, built their houses and laid out their grounds before the opening of the coal mine, the acidulated waters from which renders the same entirely useless for domestic purposes must, *ex necessitate*, give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

The law as thus laid down has been frequently followed in later cases in the Pennsylvania courts.

One of the principal ones is *Robb* vs. *Carnegie*, 145 Penn. St., 324 (1889).

This was an action in trespass on the case to recover damages for injuries to the plaintiff's land arising from the operation of certain coke ovens by the defendants.

It was held that while the owner of property is without legal redress for the effect upon its desirability and market value of the mere proximity of an undesirable business, yet if the business be so conducted as to affect the use of his property, or the health of its occupants, these tangible and substantial injuries capable of measurement by a pecuniary standard will sustain an action for damages.

It was further held, after discussing how far the *Sanderson* case was applicable to certain propositions, that, at all events, one who is engaged in manufacturing coke from coal not mined by himself, but purchased at mines of other persons remote from the land on which the manufacturing is done, will be liable in damages for a substantial injury to the crops and soil of an adjoining farm caused by the smoke and vapors emitted from its ovens as a neces-

sary incident of their operation. It was further held that while such a business, conducted in a careful manner upon a proper site, *will not be enjoined by equity* (Huckenstine's App., 70 Pa., 102), *yet one who is substantially injured thereby is entitled to redress at law.*

The following is from the opinion of the Court:

"We think it is true, as held by the judge of the "court below, that the evidence in this case would "not justify an injunction. It shows a selection of "a site as well adapted to the business and as remote "from dwellings as any in that region. To enjoin the "manufacture of coke at such a site would amount "to a prohibition of its manufacture and the de-"struction of vast allied and dependent industries of "immense value to the public as well as to those "directly engaged in them. *An injunction is not of "right but of grace, and will never be issued by a "court of equity when it will inflict a greater injury "than it will prevent. In such a case the injured "party will be left to his redress at law.* No more "than this is fairly covered by *Huckenstine's* case. "The plaintiff in this case is therefore in the right "court, and if he is substantially hurt by the use "to which the defendants have seen fit to devote "their land, we see no reason why he may not re-"cover, unless it is found in the last of the posi-"tions taken by the defendants, for which *Lippin-"cott's* case is cited.

"It is a fundamental principle of our system of "government that the interest of the public is higher "than that of the individual, so that when these "interests are in conflict the latter must give way. "If the individual is thereby deprived of his prop-"erty without fault on his part, he is entitled to "compensation, but if he is affected only in his "tastes, his personal comfort or pleasure or pref-

"erences, these he must surrender for the comfort
"and preferences of the many. Thus, highways
"are necessary to the public convenience and
"comfort. Some noise and dust are necessarily
"occasioned by the legitimate use of them. This
"may be disagreeable—perhaps, in some cases,
"positively harmful—to some one or more of the
"persons living along them, but for this there is
"no remedy at law or in equity. It is one of the
"necessary consequences of subjecting the indi-
"vidual to the public in those things as to which
"their interests are in conflict."

As noted in the opinion, the principal distinction between the *Sanderson* case and the *Robb* case consists in this: In the *Sanderson* case the Coal Company was using its own land in the only manner practicable to it; that is the only purpose for which it was useful or valuable, to wit, the mining of coal, which could only be carried on by keeping the mines in some manner free from water.

In the *Robb* case, however, the injury, if any, resulted from the manufacture of coke at a particular site. This injury, if any, "is in no sense the natural and necessary consequence of the exercise of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata."

The *Robb* case, therefore, is the same in principle as the *Pine* case, *and we are asking the Court to apply the same principle in that case which was applied by the Supreme Court of Pennsylvania, to wit: the plaintiffs should be left to their remedy in an action for damages and should not be enjoined.*

A similar question came up before the same Court in *Lentz* vs. *Carnegie*, 145 Penn. St., 612, where the rule in the *Robb* case was adhered to and the riparian owner held entitled to damages. The following is from the opinion in the *Lentz* case:

> "We held in *Robb* vs. *Carnegie* (*supra*) that this "mode of estimating damages, which is properly ap- "plicable to cases where an entry is made under the "power of eminent domain, is not ordinarily appli- "cable to actions of trespass. It is not necessary to "repeat the reasons which were given in support of "that conclusion. It is enough to say that we adhere "to them. In case of a taking the natural inquiry "is, how is that which is left affected by the taking? "Where nothing is taken, but an injurious trespass is "alleged, the question is, what will be the cost of re- "storing the thing injured to its former condition? "If the cost of restoration will equal or exceed the "value of the thing injured, then the value becomes "the measure of the plaintiff's damages."

The following are the facts as to *Huckenstein's Appeal* (70 Penn., 102) cited in the *Robb* case:

It was an appeal from a decree restraining the defendant from burning brick on his land. The decree was reversed and the appeal dismissed without prejudice to any rights the plaintiff might have to recover in an action at law. It was held that brickmaking, being a useful and necessary business and necessarily exercised near towns, the burning of bricks, an essential part of the business, is not a nuisance *per se*; that although a useful employment may produce discomfort or injury to those near it, it does not follow that it should be restrained.

The aid of a court of equity is not of right but of grace, to be extended only where its exercise is certainly just, wise and proper. In a question of restraining a lawful business, a court of equity will consider

the custom of the people, the characteristics of their business, the common uses of property and the peculiar circumstances of the place. The following is from the opinion of the Court:

"In regard to the injury to the vines and trees, "which is the chief ground of complaint, the "plaintiff's case is doubtful on two grounds. In "the first place, his testimony as to the injury from "the causes stated is counterpoised, if not out-"weighed, by the testimony of the defendant, both "in the number and skillfulness of the witnesses. "And in the second place, it is rendered more than "doubtful by the testimony of the defense that "the true cause of the blight in the vines is the "nature and cold and wet condition of the soil. "The force of the rebutting evidence that the hill-"side is dry for the reason that water will not lie "on a slope, is broken by the consideration known "to every common observer that water, following "the lines of stratification, will exhude from hill-"sides, oftentimes in large quantities and the "whole year around. To entitle the plaintiff to "an injunction, he must make out a plain case of "injury and damage. 'If the injury be doubtful, "'eventual or contingent, equity will not interfere "'by injunction.' Rhodes *vs.* Dunbar, 7 P. F. "Smith, 287; and a 'Chancellor would consider "'whether he would not do a greater injury by "'enjoining than would result from refusing and "'leaving the party to his redress at the hands of "'court and jury.' Richards appeal, 7 P. F. "Smith, 113, 114."

*Hauck* vs. *Tidewater Pipe Line Co.*, 153 Penn., 366 (1893).

This case closely resembles the *Robb and Sanderson* cases which we have cited above. This was also an

action in trespass on the case for injuries to land, springs and fishpond. The cause of the injury was oil brought from a distance, allowed to escape from the pipes and to percolate through the land. It was not, in any sense, a natural and necessary development of the land owned by the company. The principle that was applied in the Hauck case is thus stated in the head note:

"Where a corporation is clothed with the right "of eminent domain, and is especially authorized "by law to construct its works and operate them, "any injury resulting from such operation without "negligence and without malice is *damnum absque* "*injuria;* but where a corporation has no right of "eminent domain the operation of its works "causing consequential injuries to another is a "nuisance."

## FIFTH POINT.

**This is not, however, a case of a dispute between private persons merely, but involves public questions of the highest importance. The City in building this dam and diverting the water acts in its public capacity and as an agency of the State of New York, under authority of its Legislature. Its act is therefore legal and valid.**

The erection of this dam and the diversion of this water is a legal and lawful act. They are authorized by chapter 445 of the Laws of 1877 as amended. The title of the act as amended by Laws of 1879, chapter 516, is as follows:

"An Act to provide a further supply of pure "and wholesome water for the city of New York,

"and to provide for perfecting and perpetuating "the right and title of the city of New York to "property, water, water rights and privileges "heretofore taken or used or which may be here- "after taken or used by the said city to increase "the supply of pure and wholesome water for the "use of the said city, and to *provide for the pay- "ment and extinguishment of all claims or damages "growing out of such taking or using.*"

It will thus be seen that the title is in the very broadest terms, and is evidently intended to give to the City of New York all the power that the State of New York can give for such purposes.

This act, with its amendments, is printed in full as an appendix to this brief.

In the first section the City is authorized in the manner prescribed in the act, "to acquire all rights, "titles and interests in and to such real estate by "whomsoever the same may be held, enjoyed or "claimed, and to pay for and extinguish all claims and "damages on account of such rights, titles or interests "growing out of such taking or using."

It will be observed that this statute is sufficient to make the City of New York liable for damages suffered, not only to residents in or citizens of the State of New York but to any other persons.

The scheme of the act provided for the acquisition of rights, extinguishment of claims and the amount of compensation by agreement; or, if that could not be done, by the application to a Court for the appointment of Commissioners and the payment of such compensation as the Court should appoint.

If by reason of the fact that certain persons injured by the exercise of the rights conferred by this statute

are residents of another State and the laws of New York cannot operate directly as an exercise of the right of eminent domain upon them, then this Court, in the exercise of its equitable powers, should aid in carrying out a necessary public work and not allow the same to be defeated by technical difficulties. It is always to be remembered that the State has fully provided for the giving of compensation, hence all the constitutional and legal rights of the complainants have been preserved in the act. It only remains to find a way of doing this—something entirely within the equitable powers and wisdom of this Court.

In this connection we cite the two following cases:

*Long Island Water Supply Company* vs. *Brooklyn*, 166 U. S., 685 (1896), *affirming Matter of Brooklyn*, 143 N. Y., 596.

The following is from the opinion of the Court:

"All private property is held subject to the "demands of a public use. The constitutional "guarantee of just compensation is not a limita- "tion of the power to take, but only a condition of "its exercise. Whenever public uses require, the "government may appropriate any private prop- "erty on the payment of just compensation. That "the supply of water to a city is a public purpose "cannot be doubted; and hence the condemnation "of a water supply system must be recognized as "within the unquestioned limits of the power of "eminent domain. It matters not to whom the "water supply system belongs, individual or cor- "poration, or what franchises are connected with "it—all may be taken for public uses upon pay- "ment of just compensation."

In *Bauman* vs. *Ross*, 167 U. S., 548–593 (1896), the Court said:

> "By the Constitution of the United States the "estimate of the just compensation for property "taken for the public use under the right of "eminent domain is not required to be made by a "jury, but may be entrusted by Congress to com- "missioners appointed by a court, or by the "executive, or to an inquest consisting of more or "fewer men than an ordinary jury."
>
> See also *United States* vs. *Jones*, 109 U. S., 513.

In the fourteenth section provision is made for compensation for acts done by the City officers previous to the passage of the act.

In the fifteenth section it is provided that as to any damages which may have accrued previous to the taking of proceedings the act shall not be taken to deprive any one of a trial by jury on the question of damages, and the Commissioners shall estimate and determine such damages and compensation only upon the consent of all the parties.

The term "real estate" is defined in the sixteenth section, and is surely broad enough to cover any interests that may be claimed to exist in the present case.

The eighteenth section contains the following:

> "For the purpose of preventing any waste of water "the commissioner of public works of the City of "New York is hereby authorized to construct such "aqueducts, reservoirs, dams, sluices, canals and "appurtenances as may be necessary to collect or "retain the water in or from any lakes or streams "which may be taken under the operation of this "act, and use such waters as the wants and neces- "sities of said city may require, etc."

(Here follow certain provisos that are immaterial in the present case.)

The act also provides for the raising of the money needed to pay the damages by the City of New York through the sale of its bonds (secs. 19 and 20).

*Matter of Thompson*, 127 N. Y., 463 is a case arising under this Act of 1877.

It appears from the testimony that all the land required in the State of New York has been acquired under this act and paid for, and that many claiming damages in Connecticut have been settled with.

It is thus established that the dam in question has been built and the diversion of water taken place under and by virtue of a statute of the State of New York, authorizing the City of New York to do the acts complained of in this case. This statute permits the exercise of the right of eminent domain in the fullest manner that the law of any State could authorize such action, and provides means by which complete and adequate compensation must be made to any person whose property rights are damaged.

We may add here that there are other somewhat similar statutes under which the City might at the beginning of this action or now exercise rights of eminent domain for securing an adequate water supply. These statutes, though not offered in evidence, are public statutes of the State of New York, of which this Court will take judicial notice, as we understand the law.

Laws of 1883, chap. 490 (The Aqueduct Act).

Laws of 1893, chap. 189 (Sanitary Protection of the Water Supply).

Laws of 1882, chap. 410 (The Consolidation Act).

Laws of 1897, chap. 378 (The Greater New York Charter).

In this connection we refer to the two following cases:

*The United States* vs. *Great Falls Mfg. Co.*, 112 U. S., 645 (1884).

In this case certain property was taken by the officers or agents of the United States, pursuant to an Act of Congress, as private property for public use, in order to supply the City of Washington with water by means of an aqueduct from the Great Falls of the Potomac.

The following is from the opinion of the Court:

> "We are of the opinion that the United States "having by its agents, proceeding under authority "of an Act of Congress, taken the property of the "claimant for public use, are under the obligation "imposed by the Constitution to make compensa- "tion. The law will imply a promise to make the "required compensation where property to which "the Government asserts no title is taken, pur- "suant to an Act of Congress, as private property "to be applied for public uses, such an implication "being consistent with the constitutional duty of "the Government, as well as with common justice, "the claimants' cause of action is one that arises "out of an implied contract within the meaning of "the statute which confers jurisdiction upon the "Court of Claims of actions founded 'upon any "'contract, express or implied, with the Govern- "'ment of the United States.'"

This case is authority for the proposition that the State having authorized The City of New York to acquire this property and to pay for it, an implied contract has arisen which would be enforcible in the courts, so that the plaintiffs in this case would have an action on implied contract by virtue of the Law of

1877 against The City of New York for any damages they may have suffered by the diversion.

*Kaukauna Co.* vs. *Green Bay Canal Co.*,
142 U. S., 254.

This was an action for an injunction against maintaining a certain embankment. The injunction was denied and the judgment was affirmed by the Supreme Court.

The case is authority for this proposition in general: where the statute provides a definite and complete remedy for obtaining compensation that remedy is exclusive, but "it is true that if the statutory remedy be incomplete or imperfect, the owner is not thereby debarred from his common-law remedy and may recover his damages in an action of trespass or ejectment."

## SIXTH POINT.

**The State government has entire control over non-navigable waters within its limits, and hence may change or abrogate the rules of the common law relating to such waters. The control of navigable waters was vested by the Federal Constitution in the general government, leaving the control of non-navigable waters in the original States, hence it follows that the State may pass such laws as to the exercise of the right of eminent domain over such waters as it pleases. This it has done in the present case, as we have seen, by passing condemnation laws authorizing the City to exercise the right of eminent domain on paying compensation. The construction, therefore, of this dam and the diversion of water were duly authorized.**

By the Constitution of the United States, the control of navigable waters and to what extent interference therewith shall be allowed is, of course, vested in the Federal Government.

Even as to navigable waters, however, the control over the same by a State within its own boundaries remains in the State, so long as the action that may be taken by the State is not inconsistent with the Federal laws, and until Congress may legislate in relation thereto.

As to non-navigable waters, however, the jurisdiction and control of the same remain in the State Government as to waters within its own territory.

As to such waters, it has absolute and complete control thereof, and any action which the State may take

in reference thereto will not be interfered with by the Federal courts.

That the control of non-navigable waters remained vested in the original State has been taken for granted in all of the decisions.

There are a number of cases, however, which generally relate to obstructions of navigable waters which throw much light upon the subject.

One of the earlier cases was that of *Willson* vs. *The Black Bird Creek Marsh Co.*, 2 Pet., 245, decided by Chief Justice Marshall in 1829.

In that case, the defendants were incorporated under a Delaware statute and empowered to hold and improve certain marsh lands, and were authorized for that purpose to make a dam across the Black Bird Marsh Creek. They did so, and the plaintiffs being the owners of a sloop, brook down the dam and the company sued them in trespass.

The following is from the opinion of Chief Justice Marshall:

> "The Act of Assembly by which the plaintiffs
> "were authorized to construct their dam shows
> "plainly that this is one of those many creeks pass-
> "ing through a deep, level marsh, adjoining the
> "Delaware, up which the tide flows for some dis-
> "tance. The value of the property on its banks
> "must be enhanced by excluding the water from the
> "marsh, and the health of the inhabitants probably
> "improved. Measures calculated to produce these
> "objects, provided they do not come into collision
> "with the powers of the general Government, are
> "undoubtedly within those which are reserved to
> "the States. But the measure authorized by this act
> "stops a navigable creek and must be supposed to

" abridge the rights of those who have been accus-
" tomed to use it. And this abridgement, unless it
" comes in conflict with the Constitution or a law
" of the United States, is an affair between the Gov-
" ernment of Delaware and its citizens, of which this
" Court can take no cognizance. The counsel for the
" plaintiffs in error insists that it comes in conflict
" with the powers of the United States to regulate
" commerce with foreign nations and among the
" several States.

" If Congress had passed any act which bore upon
" the acts in execution of the power to regulate com-
" merce, the object of which was to control State
" legislation over those small navigable creeks into
" which the tide flows, and which abound throughout
" the lower country of the Middle and Southern States,
" we should feel not much difficulty in saying that
" a State law coming in contact with such act
" would be void. But Congress had passed no such
" act. The repugnancy of the law of Delaware to
" the Constitution is placed entirely on its repug-
" nancy to the power to regulate commerce with
" foreign nations and among the several States, a
" power which has not been exercised as to affect
" the question. We do not think that the act em-
" powering the Black Bird Creek Marsh Company
" to place a dam across the creek can, under all
" the circumstances, be considered as repugnant
" to the power to regulate commerce in its dor-
" mant state or as being in conflict with any law
" passed on the subject."

A somewhat similar case came up in *Gilman* vs. *Philadelphia*, 3 Wall., 713 (1865).

In this case the Legislature of Pennsylvania had authorized the City of Philadelphia to build a bridge

across the Schuylkill river, which was wholly within the State of Pennsylvania, and which was to be considered a navigable stream. The plaintiff, Gilman, a citizen of New Hampshire, owning valuable coal wharves just below the bridge, brought this suit for an injunction, claiming that the bridge would be an unlawful obstruction of navigation, and an illegal interference with his rights, and a public nuisance, producing to him special damages, etc.

Mr. Justice Greer dismissed the bill, and his decision was affirmed by the Supreme Court of the United States; Mr. Justice Swayne delivering the opinion of the latter Court.

It is conceded, through the opinon, that there could be no possible doubt of the legality of the bridge unless it could be said to be an obstruction to navigable waters and repugnant to the constitution and laws of the United States, touching the subject of commerce.

The following is from the opinion of Judge Swayne:

"The national Government possesses no powers
"but such as have been delegated to it. The States
"have all but such as they have surrendered. The
"power to authorize the building of bridges is not
"to be found in the Federal Constitution. It has
"not been taken from the states. It must reside
"somewhere. They had it before the Constitution
"was adopted and they have it still. 'When the
"'revolution took place the people of each State
"'became themselves sovereign, and in that char-
"'acter held the absolute right to all their navi-
"'gable waters, and the soil under them, for their
"'own common use, subject only to the rights

" ' since surrendered by the Constitution to the
" ' General Government.' "

(Sub-quotation from Martin *vs.* Waddell, 16 Peters, 410.)

Judge Swayne then quotes from the decision in Pollard's Lessee *vs.* Hagen, 3 How., 230:

Gibbons *vs.* Ogden.
The Wheeling Bridge Case, 18 How., 421.
Willson *vs.* Black Bird Creek Marsh Co., 2 Pet., 250.

—and then stated as to the *Willson* case that there was no difference in principle in that case and the one before the Court, and said:

" Without overruling the authority of that ad-
" judication, we cannot by our judgment annul the
" law of Pennsylvania. * * * The defendants
" are proceeding in no wanton or aggressive spirit.
" The authority upon which they rely was given,
" and afterward deliberately renewed by the State.
" The case stands before us as if the parties were
" the State of Pennsylvania and the United States,
" the river being wholly within her limits. We
" cannot say the State has exceeded the bounds
" of her authority until the dormant power of the
" Constitution is awakened and made effective by
" proper legislation. The reserved power of the
" States is plenary, and its exercise, in
" good faith, cannot be made the subject of re-
" view by this court. It is not denied that the de-
" fendants are justified if the law is valid. We find
" nothing in the record which would warrant us in
" disturbing the decree of the Circuit Court, which
" is therefore affirmed with costs."

We may also cite

*Transportation Co.* vs. *Chicago*, 99 U. S., 635.

*Lake Shore and Michigan R. R.* vs. *Ohio*, 165 U. S., 165.

*N. Y., N. H. & H. R. R.* vs. *New York*, 165 U. S., 628.

*U. S.* vs. *Rio Grande Dam and Irrigation Co.*, 174 U. S., 690.

See *Covington Bridge Co.* vs. *Kentucky*, 154 U. S., 204.

*Kaukauna Water Power Co.* vs. *Green Bay Co.*, 142 U. S., 254.

In *Escanaba Company* vs. *Chicago*, 107 U. S., 678, it was held that non-navigable waters are left within the jurisdiction of the State, but navigable waters are under the United States control, "but the States have full power to regulate within their limits matters of internal policy, including in that general designation whatever will promote the best comfort, convenience and prosperity of their people," etc.

*Miller* vs. *The Mayor, etc., of New York*, 109 U. S., 385 (1883).

This was a bill in equity to abate a nuisance, the alleged nuisance being the East River Bridge between New York and Brooklyn. The complainant was the lessee of certain warehouses upon the banks of the river, and he alleged that the interference of the bridge with navigation would be so great as to destroy his warehouse business, and be a private and irreparable injury to him, for which an action at law would afford no adequate redress.

The complaint was dismissed, and the following is from the opinion of the Supreme Court, written by Mr. Justice Field, affirming the decision below:

"We approve of its (the Court's) action and decree. The erection of the bridge at the elevation proposed was authorized by the action of both the State and Federal Governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent permitted by the only authorities which could act upon the subject, and the injury then apprehended and alleged by the plaintiff and now sustained is only such as is common to all persons engaged in commerce on the river and doing business on its banks, and, therefore, is not the subject of judicial cognizance. * * * The courts having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters within the States or connected with the ocean so as to preserve and protect their free navigation. This power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction is necessarily paramount and conclusive. * * * The bridge, being constructed in accordance with the legislation of both the State and Federal Governments, must be deemed a lawful structure. It cannot, after such legislation, be treated as a public nuisance; and however much it may interfere with the public right of navigation in the East river, and thereby affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the courts. The plaintiff is not deprived of his property nor of the enjoyment of it; nor does

" he, from that cause, suffer any damage different in " character from the rest of the public. He alleges " that his business as a warehouse keeper on the banks " of the river above the bridge will be in some degree " lessened by the delay attending the passage " under it of vessels with high masts. The incon- " venience and possible loss of business from this " cause are not different from that which others " on the banks of the river above the bridge may " suffer. Every public improvement whilst ad- " ding to the convenience of the people at large " affects more or less injuriously the interests of " some."

*The power of the States to change the Common Law rules as to running waters is illustrated by the law as to* APPROPRIATION OF WATERS.

In many of the Western States and Territories the Common Law has been changed and the right to running water exists without private ownership of the soil upon the ground of prior location upon the land or prior appropriation of the water. There has also been legislation upon the subject by Congress. This involves an assertion held legal, that a State can abrogate the Common Law rule and establish a different one.

See—

*Gould on Waters*, section 228.
*Atchison* vs. *Peterson*, 20 Wall, 507.
*Basey* vs. *Gallagher*, 20 Wall, 670.

The following is from the opinion of Judge Field in the *Atchison* case:

" But whether upon a petition or bill asserting that " his prior rights have been thus invaded, a court of " equity will interfere to restrain the acts of the party " complained of, will depend upon the character and " extent of the injury alleged whether it be irremed-

" iable in its nature, whether an action at law would
" afford adequate remedy, whether the parties are able
" to respond for the damages resulting from the
" injury, and other considerations which ordinarily
" govern a court of equity in the exercise of its pre-
" ventive process of injunction."

*It would seem that the proceeding by injunction is* in rem, *and must be in the jurisdiction where the nuisance exists.*

The following is from a work entitled "A Digest of the International Law of the United States Taken from Documents Issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorney Generals," by Francis Wharton. In volume 1, section 20, occurs the following:

The erection of works on the Meduxnikik river in New Brunswick in such a way as to obstruct the flow of water in Maine, and to injure the lumbering by water in that State, is a proper subject for diplomatic interposition by this Government (*Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, May* 16, 1884 (*MSS.*), *Inst. and Great Britain*). A party doing an injury in one State to a water-power running into another State may be proceeded against in civil suit in either State in which he may be served in process, though proceedings *in rem*. by way of injunction or indictment to compel abatement can only be brought in the jurisdiction in which the nuisance exists.

See—

6 Crim. Law Mag., 169.
*Stillman* vs. *Mfg. Co.*, 3 Woods & M., 538.
*Foot* vs. *Edwards*, 2 Blatch., 310.
*Miss. & Mo. R. R.* vs. *Ward*, 2 Black, 485.
*Wooster* vs. *Manco*, 31 Me., 246.
*In re Eldred*, 46 Wis., 530.
*Thayer* vs. *Brooks*, 17 Ohio, 489.
*Armendiaz* vs. *Stillman*, 54 Tex., 623.

The law of New York is as follows:

An action will not lie for an injury done by the diversion of a watercourse where the premises injured are in another State. Such actions as they relate to injuries to realty are *local* actions.

*Watts Administrators* vs. *Kinney*, 23 Wend., 484.
S. c. *on Writ of Error*, 6 Hill, 82.
*De Courcy* vs. *Stewart*, 20 Hun, 561.
*American Union Tel. Co.* vs. *Middleton*, 80 N. Y., 408.

## SEVENTH POINT.

**Having shown that a State has the right to change the rule of the common law, and that it has done so in this case by authorizing the City to exercise the right of eminent domain and making it liable for damages, we now cite certain cases more closely in point and showing that an injunction should not issue.**

The learned counsel for the complainants, in their argument below, concededly were unable to cite a case where an injunction had issued in a case just like the present one, and we have been unable to find such a case.

An important decision on which alone, we think, the decree appealed from should be reversed is the following:

*United States* vs. *Rio Grande Dam Irrigation Co.*, 174 U. S., 690 (1899).

This was a bill in equity to restrain the defendant from constructing a dam across the Rio Grande river, in the Territory of New Mexico, and appropriating the waters of that stream for the purpose of irrigation.

The following is from the opinion of the Court:

"The unquestioned rule of the common law was "that every riparian owner was entitled to the con- "tinued natural flow of the stream. It is enough, "without other citations or quotations, to quote the "language of Chancellor Kent, 3 Kent Com., and "section 439, 'Every proprietor of lands on the "'banks of a river has naturally an equal right to "'the use of the water which flows in the stream "'adjacent to his lands as it was wont to run "'(*currere solebat*), without diminution or altera- "'tion. No proprietor has a right to use the water "'to the prejudice of other proprietors above or "'below him, unless he has a prior right to divert "'it or a title to some exclusive enjoyment. He "'has no property in the water itself, but a simple "'usufruct while it passes along. *Aqua currit et* "'*debet currere ut currere solebat* is the language of "'the law. Though he may use the water while it "'runs over his land, as an incident to the land, he "'cannot unreasonably detain it, or give it another "'direction, and he must return it to its ordinary "'channel when he leaves the estate.' While this "is undoubted, and the rule obtains in those States "in the Union which have simply adopted the com- "mon law, *it is also true that as to every stream* "*within its dominion a State may change this common* "*law rule and permit the appropriation of the flow-* "*ing waters for such purposes as it deems wise.* "Whether this power to change the common law rule "and permit any specific and separate appropria- "tion of the waters of a stream belongs also to the "Legislature of the Territory, we do not deem it

" necessary for the purposes of this case to inquire.
" We concede, *arguendo*, that it does.

"Although this power of changing the common
" law rule as to streams within its dominion un-
" doubtedly belongs to each State, yet limitations
" must be recognized: First, that in the absence of
" specific authority from Congress, a State cannot,
" by its legislation, destroy the right of the United
" States as the owner of lands bordering on the
" stream to the continued flow of its waters, so
" far, at least, as may be necessary for the bene-
" ficial uses of the Government property; second,
" that it is limited by the superior power of the
" general Government to secure the uninter-
" rupted navigability of all navigable streams
" within the limits of the United States. In
" other words, the jurisdiction of the general
" Government over interstate commerce and its
" natural highways, vests in that Government the
" right to take all needed measures to preserve the
" navigability of the navigable water-courses of
" the country, even against any State action.

"It is true, there have been frequent decisions
" recognizing the power of the State, in the absence
" of Congressional legislation, to assume control of
" even navigable water within its limits, to the
" extent of creating dams, booms, bridges and
" other matters which operate as obstructions to
" navigability. The power of the State to thus
" legislate for the interest of its own citizens is
" conceded, and until, in some way, Congress
" asserts its superior power and the necessity of
" preserving the general interests of the people of
" all the States, it is assumed that said action,
" although involving temporarily an obstruction to
" the free navigability of a stream, is not subject

" to challenge. A long list of cases to this effect " can be found in the reports of this Court."

Here follow citations.

This late and important case of the highest court in the land sustains our contention in the present case. So far as it relates to navigable waters and the jurisdiction of the United States over the same, it, of course, has no application here.

It is, however, ample authority for the proposition that a State may change the common law rule as to running water and permit the appropriation of the same for such purposes as it deems wise, and that when it has done so such action is not subject to challenge.

In the present case the State of New York, by the acts of its Legislature, referred to elsewhere in this brief, has authorized the City of New York to take and appropriate the waters of the Byram river, within its own boundaries, for the purpose of supplying its citizens with pure and wholesome water. The State has also provided in the said acts an ample and complete method of compensating anyone who may be injured by the diversion of water. It has, therefore, been guilty of no illegal act, and hence no injunction should issue.

A similar principle was adopted in the following case, to wit:

*Osborne* vs. *Missouri Pacific Railway Co.*,
147 U. S., 248 (1892).

This was a bill in equity against the railroad company by the owner of a building on the public street in St. Louis, upon which the company was about, under competent municipal authority, to lay down tracks for use in running cars drawn by steam power. The bill was for an injunction. It was held that the complainant

had an adequate remedy at law for the injuries complained of, and was not entitled to the injunction.

The following is from the opinion of the Court:

"Equitable jurisdiction may be invoked in view "of the inadequacy of the legal remedy where the "injury is destructive or of a continuous character "or irreparable in its nature; and the appropria- "tion of private property to public use, under color "of law, but in fact without authority, is such an "invasion of private rights as may be assumed to "be essentially irremediable, if, indeed, relief may "not be awarded *ex debito justitiae*.

"But where there is no direct taking of the estate "itself, in whole or in part, and the injury com- "plained of is the infliction of damage in respect "to the complete enjoyment thereof, a court of "equity must be satisfied that the threatened "damage is substantial and the remedy at law in "fact inadequate before restraint will be laid down "upon the progress of a public work. And if the "case made discloses only a legal right to recover "damages rather than to demand compensation, "the court will decline to interfere.

"In McElroy *vs.* Kansas City, 21 Fed. Rep., 257, "which was an application for an injunction to re- "strain the grading of a street in front of the com- "plainant's lot, Mr. Justice Brewer, then Circuit "Judge, considered under what circumstances a "chancellor could grant such relief. It was ruled "that, if the injury which the complainant would "sustain from the act sought to be enjoined could "be fully and easily compensated at law, while, "on the other hand, the defendant would suffer "great damage, and especially if the public would "suffer large inconvenience, if the contemplated

"act were restrained, the injunction should be "refused, and the complainant remitted to his "action for damages."

*Union Steamboat Co.* vs. *The City of Chicago*, 39 Fed. Rep., 723, and certain other cases may also be cited, to wit:

Where the action of a city in executing a public work is within the scope of its authority, and free from fraud and corruption, it will not be enjoined, though the methods adopted result in special damage to a complainant. This is an opinion by Chief Justice Fuller, and is decided, apparently, mainly on the authority of the *Escanaba Co.* vs. *Chicago; Willson* vs. *The Marsh Co., and Gilman* vs. *Philadelphia*, all of which have already been cited.

*New Haven Water Co.* vs. *Wallingford*, 72 Conn., 293 (October, 1899).

This was an action brought to restrain the Borough of Wallingford from diverting the waters of the Pine river. The plaintiff was a private corporation engaged in supplying the City of New Haven with water, and the defendant was a municipal corporation. The following is from the opinion:

"The plaintiff next claims that as a riparian "owner, it is entitled to the full flow of the river, "and to an injunction to restrain the defendant "from diverting the water, at least until it pays "damages for such diversion. It is conceded that "the defendant has not paid damages for diversion "of the water from the plaintiff's property, and "that it is liable in damages for such diversion. "But the real question in this case does not relate "to the right of the plaintiff as riparian owner "to damages, nor to the amount of such damage, "nor even to its right under certain circumstances

" to an injunction restraining the diversion until " damages have been paid, but it relates to the " very different question whether the Court erred " in refusing to grant an injunction upon the facts " found. The answer to this question is to be " looked for in the several facts found. The plain- " tiff bought its property in 1897, with full knowl- " edge of what the borough had done prior to that " time in this matter, and with full knowledge of " all the other appurtenant facts put upon the " record. The water diverted is necessary for the " uses of the borough, and to enjoin the defendant " from diverting it might cause great hardship. " This stream is practically the only source of ad- " ditional supply open to the borough. It is " found that it is doubtful whether the damage to " riparian owners below the pumping station will " be more than nominal; the borough has tried to " settle for them, and is ready and willing, and " abundantly able to pay them as soon as the " amount is ascertained. Upon the facts found " upon this part of the case, the injunction was " properly refused."

*Harding* vs. *Stamford Water Co.*, 41 Conn., 87.

A woolen mill was established on a water-course which it used in part for power and in part for wool, the supply in dry season being sufficient only for the latter. Afterwards a corporation, under a charter from the Legislature, purchased a tract of land four miles above on the stream, and at that point diverted a portion of the water to the Borough of Stamford for the domestic use of the inhabitants, and for manufacturing and other purposes. The charter contained a provision that the corporation should be liable to no damage for taking the water. The owners of the mill brought a petition for an injunction, pending which the

corporation procured an amendment to its charter providing for compensation for property taken. The diversion of the water was no damage to the petitioners, except during the dry season.

(1) Held that the diversion was one which the respondents as riparian proprietors had no right to make.

(2) That the provision of the charter giving them the power to take the water without making compensation was unconstitutional and void.

(3) That in view of the amendment of their charter providing for compensation, the Court in its discretion would allow the respondents time to make compensation, and if not made that a perpetual injunction should be granted.

*Higgins* vs. *Flemington Water Co.*, 36 N. J. Eq., 538 (1883).

(1) A diversion of a water-course by the authority of a riparian proprietor to enable a company to supply, in part, a village with water is a legal wrong to another riparian owner, who thereby sustains a perceptible and substantial damage.

(2) As between co-proprietors, such a diversion is not a reasonable use of the common property.

(3) After entertaining a bill for such a wrong, and settling on final hearing the legal right of the complainant, a Court of Equity will not send him to law for redress, but will enjoin the defendant from making such diversion.

*The following late cases may also be referred to:*

*Sparks Manufacturing Co.* vs. *Town of Newton*, 45 Atl. Rep. 596 (Court of Errors and Appeals of New Jersey, March 5, 1900).

(1) When a riparian proprietor seeks the aid of a Court of Equity to restrain the diversion of water of a municipal corporation for public purposes, and offers to forego his right to an injunction on recovering just compensation which he asks the Court to determine, and the defendant in its answer consents to pay such compensation, so to be determined by the Court, in case the Court considers the complainant entitled to an injunction, the Court has jurisdiction to ascertain the amount of such compensation.

A municipality which buys a piece of land on a private stream several miles distant from its corporate limits does not thereby become entitled as riparian owner to draw from the stream a supply of water for the inhabitants of the town.

The Town of Newton has no authority to divert water from private streams to the detriment of lower riparian owners, on condition that it will store storm water and give it out into the streams in dry times and thus confer a compensatory benefit on these owners, they not consenting thereto.

The circumstances of these cases are fully stated in the opinion of Vice-Chancellor Pitney, in 57 N. J. Eq., 367; 41 Atl., 385.

*Platt* vs. *The City of Waterbury*, 45 Atl. Rep., 154 (Conn., Jan. 4, 1900).

This was a suit to restrain the defendant from polluting with sewerage the Naugatuck river, for damages and injunction, etc. It was held that the discharge of sewerage into the river was an unreasonable use of the stream and could not be acquired by proscription. Merely granting a city authority by its charter to construct sewers to carry off the refuse of its inhabitants to a river does not make such use of the sewers a governmental act freeing the city from personal liability

for injuries resulting therefrom, as from the lawful exercise of a governmental power.

Pollution of a river by city sewers so as to destroy the value of property located thereon is a taking of private property for a public use within the meaning of the constitutional requirement that just compensation shall be paid therefor, and, no matter what the necessity therefor, the city cannot avoid its liability to render just compensation therefor.

It was held that where the sewage of a city polluted a stream so as to destroy the value of plaintiff's manufacturing plant located thereon, the plaintiffs were entitled to maintain an injunction against the city to compel it to provide other means for disposing of its sewage within ample time, or to compensate plaintiffs for injuries sustained to their property. The following is from the opinion of the Court:

> "The appropriation of the river to carry such
> "substances to the property of another is an in-
> "vasion of his right of property. When done for
> "a private purpose it is an unjustifiable wrong.
> "When done for a public purpose it may become
> "justifiable, but only upon payment of compensa-
> "tion for the property thus taken. Public neces-
> "sity may justify the taking, but cannot justify
> "the taking without compensation."

*Watson* vs. *Town of New Milford*, 45 Atl. Rep., 167 (Conn., January 19, 1900).

This was also a case of pollution of a stream by sewage (see opinion of Baldwin, *J.*)

*Grey, Attorney-General* vs. *Mayor, etc., of Paterson*, 45 Atl. Rep., 995 (Court of Errors and Appeals of New Jersey, March 5, 1900).

Held, that the City of Paterson had legislative authority to construct its system of sewers, discharging their contents into the Passaic river, and is not therefore subject to the charge of maintaining a public nuisance. Also held, that by reason of the great injury which would fall upon the City by restaining the continuous use of its sewerage system, and the acquiescence of these riparian owners above where the tide flows, their injury being comparatively small, it would be inequitable to grant them an injunction.

Held, that they might obtain redress by amending their bill, or by filing a new bill praying for an injunction unless the City of Paterson will consent to make such compensation to them as shall be ascertained to be just, or, they may, if they elect, sue at law for their damages.

*Mayor, etc., of Newark* vs. *Sayre*, 45 Atl. Rep., 985 (Court of Errors and Appeals of New Jersey, April 2, 1900).

Held, that the Legislature of the State of New Jersey has constitutional power to confer on municipalities the right to use the tidal streams within its borders as outlets for public sewers, and that the City of Newark had the right to use the Passaic river for such purposes.

Although such use pollutes the water and air in the neighborhood of a dock on the river owned by private persons, and lessens its value, that fact would not justify an injunction to restrain the City from constructing and operating a sewer which the municipal authorities have within the limits of their local jurisdiction determined to be necessary for sewerage purposes.

*Rockport Water Co.* vs. *Inhabitants of Rockport*, 161 Mass., 279.

Under a statute authorizing a town to take by purchase or otherwise the franchise or corporate property

of a water company "on payment to said corporation of the actual cost of its franchise, works," etc., a payment is not a condition precedent to the taking, and the water company cannot maintain a bill in equity to enjoin the town after the taking and before payment from preventing the laying of water-pipes by the company.

## EIGHTH POINT.

### As to certain decisions where water rights in adjacent States were affected.

We believe it is substantially conceded by the learned counsel for the complainants that no case can be found where an injunction has issued in a situation substantially the same as the present one. At the risk of making this brief unduly lengthy, but with the hope of assisting the Court, we print statements of the substance of all the important cases which seem to us to have a bearing upon this point.

*In Massachusetts the difficulty seems to have been solved by allowing the person in the adjacent State injured by the diversion of waters in Massachusetts to sue in tort in the courts of Massachusetts.*

*It seems to be tacitly assumed that an injunction would not lie.*

*Bannigan* vs. *City of Worcester*, 30 Fed. Rep., 392 (1887).

In this case the complainants were citizens of Rhode Island and owners of mill property on the banks of the Blackstone river, in that State.

The defendant, under a Massachusetts statute, had taken its water supply from the Tatnuck brook, a tributary of the Blackstone river, in Massachusetts.

The plaintiffs, pursuant to the said statute, filed their petitions in the Massachusetts Court, praying for the appointment of Commissioners and the amount of damages.

The plaintiff then removed the case into the United States Circuit Court for the District of Massachusetts. This case and several somewhat similar ones were before the Court on motions to remand and on demurrers to the petitions.

The following is from the opinion:

"I am of opinion, however, that it is the duty "of this Court to entertain the suit and to ascer- "tain and enforce the rights of the plaintiffs by "the proceeding which the State Law prescribed, "whether it be by the usual process of law actions "or by a special process prescribed for the occa- "sion. The defendant argues that the appoint- "ment of Commissioners properly belongs to the "State Court, and that a controversy removal to "the Federal Court does not arise in these cases, "unless there should be an appeal to a jury after "the award of the Commissioners comes in. But "I see no reason why this Court cannot adminis- "ter relief by the appointment of Commissioners, "as well as by trying the question of damages with "a jury. * * *

"On the demurrer the defendant alleges that "the petitions show no case for relief under the "statute. The argument is that since the lands of "the petitioners are in Rhode Island, and their "rights in the water of Tatnuck Brook are appur- "tenant to those lands, the petitioners cannot "claim a remedy under this statute unless it

" be held to have extra-territorial effect, which, " of course, is inadmissible. I cannot agree with " this argument. It has been held by the Su- " preme Court of Massachusetts that the owner of " land in an adjoining State may have, as appurtenant " to such land, an interest in land or water in Mass- " achusetts, which may be protected by suit in the " courts of that State (*Manville Co.* vs. *City of* " *Worcester*, 138 Mass., 89). I am strongly inclined " to the opinion that the decision in that case is of " binding force on this Court in the case at bar; and, " even if it be not so, I am inclined to follow that " case as being of high authority, and well sup- " ported by the reasoning of the opinion."

*Manville Co.* vs. *City of Worcester*, 138 Mass., 89.

This was an action of tort, for diverting the waters of a natural stream in Massachusetts, and preventing the same from coming to the plaintiff's mill in the adjoining State of Rhode Island.

It was held that such an action could be maintained in the State courts of Massachusetts.

The following is from the opinion:

" The defendant's counsel contended, in the first " place, that such rights as the plaintiff claims " cannot extend beyond the Rhode Island line, and " went the length of maintaining that a servitude " cannot be created in one State in favor of lands " in another. We are unable to agree to this prop- " osition upon either principle or authority. " Every decision and dictum that we have found, " bearing on the precise point, is the other way " citing cases) * * *.

" We think that the cases which recognize civil, " and even criminal liability for flowing land in one

"State by means of a dam in another, are hardly "less pertinent (citing cases). The defendant ad- "mits these cases to be law and tries to distinguish "them. But we cannot assent to the distinction "between discharging and withdrawing water. "The consequence in one case is positive, in the "other negative; but in each case it is the con- "sequence of an act done outside the juris- "diction where the harm occurs, and the con- "sequence is as direct in the latter case as "in the former. The right infringed in "the former case is called absolute owner- "ship, in the latter, easement; but the laws "of Rhode Island, which make a man owner of a "tract of land there, have no more power to dimin- "ish freedom of action in Massachusetts than any "other of its laws. A concurrence of the laws of "both States is as necessary in that case as in the "one at bar, to create a liability which can be en- "forced in either State consistently with principle. "Such a concurrence presents no technical diffi- "culties, and, if the substantive end to be attained "is a proper one it will be recognized and acted on "here, as we have no doubt it would be in Rhode "Island if the position of the parties were re- "versed.

"Of course, the laws of Rhode Island cannot "subject Massachusetts land to a servitude, and, "apart from any constitutional considerations, if "there are any, which we do not mean to intimate, "Massachusetts might prohibit the creation of such "servitude so it might authorize any acts to be done "within its limits, however injurious to lands or "persons outside them. But it does not do either. "It has no more objection to a citizen of Rhode "Island owning an easement as incident to his "ownership of land in that State than it has to

" his owning it in gross, or to his purchasing lands
" here in fee. Questions might be conceived as to
" the transfer of such easements, but they do not
" arise here (Slack *vs.* Walcott, *ubi supra*). So far
" as their creation is concerned, the law of Massa-
" chussetts governs, whether the mode of creation
" be by deed or prescription, or whether the right
" be one which is regarded as naturally arising out
" of the relation between the two estates; being
" created, the law of Rhode Island, by permission
" of that of Massachusetts, lays hold of them and
" attaches them in such way as it seems fit to land
" there, Massachusetts being secured against any-
" thing contrary to its views of policy by the com-
" mon traditions of the two States and by the
" power over its own territory which it holds in
" reserve."

*Brickett* vs. *Haverhill Aqueduct Co.*, 142 Mass., 394 (1886).

This was an action in tort for obstructing and diverting a water-course. The act of the defendant was done under authority of the statute of Massachusetts, authorizing an aqueduct corporation to take and use waters of certain ponds to supply the inhabitants of a town with water under certain conditions.

The plaintiff owned lands situated partly in Massachusetts and partly in New Hampshire through which the stream flowed. He contended that the effect of taking the water and building the dam was to diminish the flow of water through his land, and has brought this common-law action of tort for diversion of the water or the stream.

It was held that so far as the acts done are within the authority of the statute, the damages must be ascertained in the manner provided by statute; but where the proceeding under the statute violates the provisions thereof

and causes damage to the land-owner, the latter may maintain an action of tort, and it is immaterial that the lands so injured is situated in another State.

The following is from the opinion:

> "We do not deem it important that the land of "the plaintiff which was injured was outside of "the limits of this State. The language of the "act is general and puts all water rights upon the "same footing and applies to the proprietor out- "side the State. Such proprietor certainly has "no greater rights than the citizen whose lands or "water rights within the State are injured by the "acts of the defendant under authority of the "Legislature. Whether the constitutional objection "we have considered would be open to a citizen of "another State whose lands or water rights in that "State are injured we need not discuss or decide."

*The following were cases cited below by the learned counsel for the complainant as sustaining his contention.*

*It will be evident from the summary of these cases, which we have tried to make entirely fair, that none of them pass upon the vital points of this case.*

> *The Holyoke Water Power Co.* vs. *The Connecticut River Co.*, 22 Blatch., 131 (1884); S. C. 20 Fed. Rep.; also reported but not in full, 52 Conn., 570.

This was a decision by Mr. Justice Shipman, sitting as Judge of the Circuit Court of the United States for the Second Circuit.

The defendant was a Connecticut corporation incorporated "for the purpose of improving the boat navigation of Connecticut river," a navigable stream, and to remove certain obstructions from the channels and bars of said river, to construct dams for the purpose of

entering the locks, but in such a way as not to prevent the convenient passage of boats, lumber and fish.

Under this charter the defendant built a dam in the State of Connecticut at Enfield Falls on the Connecticut river.

The plaintiff was incorporated under the laws of Massachusetts for the purpose of upholding and maintaining a dam across the Connecticut river above the defendant's dam and in the State of Massachusetts.

The plaintiffs claimed that the raising of the dam by the defendant would set back the water upon the plaintiff's works and diminish the effective head of its fall, and hence brought this bill for an injunction. A decree was granted against a further raising of the dam and against the constructing of a new dam to a greater height than the height occupied by the present structure.

The following is from the opinion of Judge Shipman :

" The defendant insists that, inasmuch as the " State of Connecticut authorized the addition to " the dam for the purpose of improving the navi- " gation of Connecticut river within the limits " of the State, any consequential injury not " amounting to the taking of land, which is occa- " sioned in the exercise of ordinary care by reason " of such improvement, to the land of a riparian " proprietor, is *damnum absque injuria;* and it may " be considered as settled that, where a State, by " itself or by its agents, in the construction of " works authorized or directed by the Legislature " of such State, for the benefit of the navigation of " a navigable river within its borders, causes, with- " out malice and in the exercise of ordinary care, " a necessary consequential injury to land within " its borders, no relief will be granted against such

" injury. The State and Federal courts concur in " the assertion of this principle. The Supreme " Court of Errors of Connecticut says, in regard to " works erected for the improvement of the navi- " gation of Connecticut river: 'The public, being " ' the owners of this river, have an unques- " ' tionable right to improve the navigation of " ' it without any liability for remote and con- " ' sequential damage to individuals' (Hollister *vs.* " Union Co., 9 Conn., 436). 'Acts done in the " ' proper exercise of governmental powers, and " ' not directly encroaching upon private prop- " ' erty, though their consequences may impair its " ' use, are universally held not to be a taking, " ' within the meaning of the constitutional pro- " ' vision. They do not entitle the owner of such " ' property to compensation from the State or its " ' agents or give him any right of action. This is " ' supported by an immense weight of author- " ' ity * * *. We have examined the decisions " ' of the Court of Illinois, and others to which we " ' have been referred by the plaintiffs-in-error, " ' but in none of them was it decided that a " ' riparian owner on a navigable stream, or that " ' an adjoiner on a public highway, can maintain " ' a suit at common law against public agents to " ' recover consequential damages resulting from " ' obstructing a stream or highway in pursuance " ' of legislative authority, unless that authority " ' has been transcended, or unless there was a " ' wanton injury inflicted, or carelessness, negli- " ' gence, or want of skill in causing the obstruc- " ' tion' (Transportation Company *vs.* Chicago, 99 " U. S., 635).

" In this case the injury will be caused to prop- " erty beyond the limits of Connecticut, and the " question arises whether the doctrine which

" has been asserted is applicable to this state " of facts. This question has never, so far as I " can ascertain, been decided by the courts of " this country. The question has arisen whether, " by virtue of the right of eminent domain, " one State can take, or subject to public use, " land in another State, and the decisions have " naturally been against such a power (Farnum " *vs.* Canal Co., 1 Sumn., 46; Salisbury Mills *vs.* " Forsaith, 57 N. H., 124; Wooster *vs.* Great " Falls Co., 39 Me., 246; United States *vs.* Ames, " 1 W. & M., 76). In two cases which have re- " cently arisen in Federal courts, and which " involved the right of a State to regulate or to " improve the navigation of a river wholly within " its limits, the judges have carefully limited their " decisions to the facts in the cases (Escanaba Co. " *vs.* Chicago, (107 U. S., 678; Huse *vs.* Glover, 15 " Fed. Rep., 296). Important suggestions which " bear upon the questions in this case are made " by Judge Treat in Rutz *vs.* St. Louis (7 Fed. " Rep., 438), and by Mr. Justice McLean, in Pal- " mer *vs.* Commrs. of Cuyahoga Co. (3 McLean, 226).

" The rule which has been referred to is based " upon the principle that the improvement of " the navigation of navigable rivers within a " State, is a part of the State's governmental " duties, and that the work which is done towards " such improvement is done in the discharge of " the governmental powers of the State, and " that the land of the riparian proprietor within " the State is subject to the just exercise of " this power, and that when the State undertakes " to exercise its governmental power the public " good is paramount to the consequential injury to " land which is incidentally and necessarily affected " by the improvement. The land is under the

"jurisdiction of the State, and the State derives "the power to inflict remote and consequential in- "juries upon it by virtue of such jurisdiction. "The owner of land abutting upon a navigable "river owns it subject to the right of the State to "improve the navigation of the river, because the "land is within the governmental control of the "State, but it seems to me that the State obtains "by virtue of its governmental powers no control "over or right to injure land without its jurisdic- "tion. Jurisdiction confers the power and the right "to inflict consequential injury, but where no juris- "diction exists the right ceases to exist. It is a "recognized principle that the statutes of one State "in regard to real estate, cannot act extra-territo- "rially. As Connecticut has no direct jurisdiction "or control over real estate situate in another "State, it cannot indirectly, by virtue of its at- "tempted improvement of its own navigable "waters, control or subject to injury foreign real "estate. If this resolution is a bar to an action "for any consequential injury to land or to rights "connected with land, in Massachusetts, Connecti- "cut is acting extra-territorially."

It is to be observed of this case that it is entirely between private persons. No private rights are involved, nor was it proposed to give compensation to the plaintiff, nor, in fact, were there any means provided for doing so, and it might also be added that the stream was a navigable one.

*The claim was that the injury could be inflicted without liability for damages.*

The case is thus radically different from the one now before the Court.

*Rutz and others* vs. *City of St. Louis*, 7 Fed. Rep., 438. (1881).

This was an action at law for the recovery of damages in the Circuit Court for the Eastern District of Missouri. Damages were said to have been caused to the plaintiff's land in the State of Illinois, opposite the City of St. Louis, bordering on the Mississippi river, because of a dyke built on the Missouri shore unlawfully, which dyke caused the plaintiff's land to be washed away.

One of the points raised was that the action was a *local* one and hence not in the proper court.

The following is from the opinion of Judge Treat:

"And hence, if the common law rule as to *local* "actions must prevail, the plaintiff is remediless, "practically, however great the wrong sustained, "because no legal service could be there had.

"It seems that the old rule as to *local* actions "should not be considered applicable to suits of "this nature. Where there is a wrong, there must "be a remedy. The injury in this case was caused "by defendant acting within another jurisdiction.

"*Second*—Defendant contends that the dyke "built by it was under authority of Missouri "statutes, and consequently was not unlawful, "despite the averments in plaintiff's petition to the "contrary.

"Can such a proposition be raised by demurrer "to the petition? If the United States courts are "bound to take notice of public acts of every State, "and the State of Missouri, by statute authorized "the dyke to be erected, then it was a lawful "structure, intra-territorially, if properly erected, "and does not fall within the rules concerning "nuisances (Citing cases)."

The rest of the opinion is unimportant in this connection, dealing with the question as affected by the navigability of the Mississippi river.

*Farnum* vs. *Blackstone Canal Corporation*, 1 Sumner, 146 (1830) (United States Circuit Court of Rhode Island, before Judges Storey and Pitman).

This was an action to compel the proprietors of the canal to reduce the height of a dam across the Blackstone river, which had been raised by them whereby the operations of the plaintiff's mill were impeded, and for a perpetual injunction.

In the head note of this case there is the following *quære*:

> "If the Legislature of that State can authorize "a dam locally in that State to be raised so as to "flow back a public river running into another "State to the injury of mill privileges, locally "situate in the latter State?"

In this case the questions arose between two corporations created by adjacent States, with the same name, and authorized to construct a canal in each of the States respectively. The main question in this case was whether the acts of incorporation authorized the act which was complained of.

Here, also, it would seem to have been contended that there was no liability for damages and no means of compelling judgment thereof.

> *U. S.* vs. *Ames*, 1 Woodbury & Min., 76 (1845).

This was an action in the Circuit Court of the United States for the First Circuit, and was in trespass on the case for flowing land of the United States situated in Springfield over which jurisdiction had been ceded to

them by the State of Massachusetts. The question simply was whether the laws of Massachusetts applied as to flowage to lands that had been ceded to the United States Government. The case is of no application to the present one.

*Stillman* vs. *White Rock Manufacturing Co.*, 3 Woodbury & Min., 538. (In the Circuit Court of the United States, for the First Circuit, at Boston (1847):)

This was an action for an injunction against the diversion of water. The owner was a citizen of Connecticut, and the defendant a corporation in Rhode Island. The plaintiffs owned an undivided half of certain land in Connecticut, and a mill dam over the Pawtucket river, and one-half the water-power thereof, the said river being the dividing line between Rhode Island and Connecticut. The defendants owned the eastern half of another dam 250 rods above this one, and the eastern half of this one, both being situated in the State of Rhode Island. They also owned one-half the power of the river. The defendant company made a canal from the upper dam of the easterly side of the river and diverted a portion of the water above it around the lower dam and running then into the river below. This was used to the injury of the complainant, and hence they prayed for an injunction.

The following is from the opinion of the court:

> "If both sides of the river were situate in the "same State, under the same laws, or were within "the jurisdiction of the same courts, then to dis- "criminate as to the powers, extent and legality "of the injury for which the action was brought "would often be of little importance.
>
> "But here, unfortunately, different States and "different laws, in some respects, upon the two "sides and different circuits of this Court possess

" jurisdiction on each side no less than different " State Courts.

" It seems necessary, therefore, to ascertain now " what is the interest, if any, which the complain- " ants, by owning land on the Connecticut side of " the river, are entitled to in the water on the " Rhode Island side; and, indeed, this becomes " almost the whole gist of the controversy.

" After careful inquiry this interest seems to me " to be such a corporeal easement or right as has " just been described, to an individual half of the " water on that side, as well as on the other side. A " fence or embankment cannot be usually made in the " middle of a large stream where the right to the soil " terminates; and if made, it would not correspond " with the true interests each owner on the banks has " to some extent in all the flowing water between " these banks. Hence, it is reasonable to regard these " interests in the whole stream to be an undivided " half, or tenancy in common, and if either side uses " or takes out more than half, or at a place above " removes and diverts large quantities from coming " at all to the dam, where the complainants are in- " terested, their proportionate interests in the whole " stream are injured, and an action of some " kind or other must lie for redress somewhere. " * * * * True, different forms of actions " may lie as redress is sought for different views of " the injury, and these different actions may be " brought properly in one State or the other, as they " relate more immediately to the acts done as affect- " ing the land and mills complainants own in Con- " necticut, or as affecting the undivided share in the " water on the Rhode Island side which the com- " plainants also own. The canal here being on the " Rhode Island side and first injuring the rights of " the complainants there to an undivided one-half of

" the stream would seem to justify an appropriate
" remedy there for that particular wrong.

" The injury, thus far, and in this view, may be
" regarded as committed on interests possessed in the
" water beyond the centre of the stream, and not
" injury on and to the mill situated upon one of the
" banks, or to merely that half of the stream which
" is contiguous. Such interests may exist in water
" and its use. 2 N. Hampr., 259.

" The first and direct injury, then, is to the ease-
" ment and consequent rights existing beyond the
" centre. The next consequential injury would be to
" the mills and land adjoining the stream before
" reaching the centre on the Connecticut side, and a
" proper remedy for that would lie there. Thus, a
" right of way on land in one State to a farm in
" another is an interest situated in the first State and
" an obstruction may be there prosecuted. * * *
" The chief error in the position of the respondents
" is in supposing that the plaintiffs have no rights
" whatever beyond the centre of the river or no in-
" terests to be protected there. If this be the correct
" view which I have adopted, then no question arises
" as to jurisdiction over the subject of this bill by
" this Court any more than as to the code of laws
" that must control our decision. It must be the
" code beyond the centre when the action is brought
" for a violation of the complainant's right exist-
" ing beyond the centre, and which is here the
" code of Rhode Island, and jurisdiction must
" be and properly is here for an injury done
" there, and hence the prosecution must be for
" that in the courts of Rhode Island, or if pursued
" in the tribunal of the general government, it
" must be not in the second circuit of Connecticut,
" but in the first circuit held in the district of
" Rhode Island. Nothing can more fully illustrate

"the propriety of this view in the present in-
"stance than some of the incidents to the peculiar
"remedy by injunction which is sought here. A
"party is entitled to that remedy in case of great
"and irreparable injuries inflicted on him if
"done without right. Yet, here this remedy
"must be sought in Rhode Island or it would
"be of no use. The canal is situated there
"which is made to divert the water. The owners
"of the canal, the supposed wrongdoers, reside
"there, and an injunction issued in another
"State or circuit, could not be executed
"there, it being a proceeding *quasi in rem*. The
"injured party, then, must be deprived entirely of
"this legal summary and useful species of redress
"unless rights and jurisdiction to protect them
"exist beyond the centre of the stream. * * *
"But the first act done in the present case was
"done in Rhode Island, and is proceeded against
"as a private nuisance erected in Rhode Island.
"The remedy by injunction is a specific one, or
"*quasi in rem*, and whether that nuisance be in
"fact situated in Rhode Island or Connecticut,
"it must be enjoined against, wherever it is,
"and there alone, and by the laws existing
"there alone it must be abated, if at all. Sup-
"pose it is proceeded against criminally, it
"surely may be in Rhode Island, where it is
"erected and where it is the injury. Why not,
"then, if prosecuted in a civil form? * * * It
"is no answer to all this that some injury is done
"by this canal to property and rights on the Con-
"necticut side, and for which a real action could
"not be brought, except in Connecticut, and could
"not be decided except in conformity to the laws
"of Connecticut. The complainants in this case
"have not chosen to resort to such an action any-
"where, much less in this State, and, on the con-

" trary, have prayed for an injunction against the
" diversion of the water on the Rhode Island side,
" and by an unwarranted canal used there to re-
" move large quantities of it entirely from the dam
" occupied in part by the complainants, and it is
" manifest that this remedy for this evil must be
" prosecuted in Rhode Island alone, where the
" nuisance is situated, and where it is to be re-
" strained or nowhere. * * * * These points
" settled, the whole case is settled."

*Note*—The judge would seem to hold also that the Rhode Island statute of twenty years as to prescription prevailed, and not the Connecticut statute of fifteen years; or, in other words, that the Rhode Island law was to govern and not the Connecticut law.

*Note*—It will be observed that no question of public use was raised in this case, nor of eminent domain, nor of right under special State statutes, nor of compensation, the case being determined apparently upon the common law principle relating to flowing waters.

*Foot* vs. *Edwards*, 3 Blatchford, 310 (1855).

This was an action for damages for an injury to mill property of the plaintiffs situated in Massachusetts by the diversion of a stream of water upon which the mill stood. The act causing the diverson was committed in Connecticut. It was held that the Circuit Court of the United States for Connecticut had jurisdiction of an action by the mill-owner against the person who diverted the water in Connecticut, for damages caused by said diversion.

It would seem, from the clear and satisfactory argument of the judge, that a suit of this nature might be brought either in the jurisdiction where the wrongful

act was done or in the jurisdiction where the land injured was situated.

*Crosby* vs. *Hanover*, 36 N. H., 404.

This case holds that the laws of New Hampshire as to laying out highways cannot go to the extent of condemning a pier and abutment of a bridge across the Connecticut river in Vermont.

*Salisbury Mills* vs. *Forsaith*, 57 N. H., 124 (1876).

A Massachusetts corporation having erected a dam in Massachusetts on its own land, whereby the water of a stream was set back upon the land of a riparian owner above in the State of New Hampshire, cannot by petition have the damage of such land only assessed, and have their rights of flowage ascertained and fixed under the New Hampshire act for the encouragement of manufacturers.

"It is certain that this act can have no extra "territorial application or effect. The use and "management of Massachusetts real estate cannot "be subjected to the control of New Hampshire "laws. The Legislature of this State can no "more confer upon a Massachusetts corporation "the right to build a dam and water mill "upon their own land or the land of another with its "consent in that State than it can forbid such act "there, and so far as I can see they might as well be "either or both as to impose terms, conditions and "regulations upon the building of such dam and "mill as provided by the act. * * * It is one of "the plainest elementary rules that no Legisla-"ture can extend its laws to territory beyond the "borders of its own State. Now, then, can the "courts of this State have any jurisdiction over "lands and mills in another State? How shall a

" court in New Hampshire decree that a corpora-
" tion in Massachusetts may not maintain a dam
" in that State above a certain height, and if such
" decree were made, how would the court be able
" to enforce it?"

The case of Wooster *vs.* Great Falls Mfg. Co., 39 Me., 246, was regarded as in point.

See also Wooster *vs.* Winnipissogee Lake Co., 25 N. H., 525.

In the latter case it was held that the action should be brought where the land injured lies.

*Wooster* vs. *Great Falls Mfg. Co.*, 39 Me., 246.

This was an action in trespass on the case to recover damages for flowage of land. By a Maine statute it was provided that any man may erect and maintain a water mill and a dam to raise water for working it upon and across any stream that is not navigable, upon the conditions therein named, and when such dam is lawfully erected the person sustaining damages in his lands by being overflowed may obtain compensation by complaint, and that no action shall be sustained at common law for recovery of damages for such overflowing of land, except in the manner provided to enforce the payment of damages after they have been ascertained by complaint.

To entitle the owners of a dam and mill to the benefits of this statute, the mill as well as the dam must be situated within the limits of this State.

And where the owner of land is damaged by its overflow, by means of a dam erected to operate a mill situated in another state across a river, the boundary of the two states, he may maintain an action for his indemnity at common law.

## NINTH POINT.

### As to what action this Court should take.

Three courses are open to this Court to remedy the obvious injustice that would result to the public and private interests of New York if the decree appealed from should remain in force:

(1) This Court might reverse the decree and dismiss the bill without prejudice to any action the complainants might see fit to take in an action at law for damages or in procedure under the Act of 1877 (see *Raton Water Works* vs. *Raton*, 174 U. S., 360).

(2) It might remand the case to the Circuit Court to take evidence of what restrictions and conditions could be placed on the use of the dam and water, so that no substantial injury could result to the complainants (see suggestions quoted on page 35 of this brief from the opinion in *Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303);

(3) It might adopt the course followed by the New York Court of Appeals in the elevated railroad cases. That is, the Court could refer the matter to a Master to take testimony as to the amount of damages, and, after the same have been ascertained, only grant an injunction if the defendants neglect to pay the same within a reasonable time. The Court might also, if the practice will allow, refer the question of damages to a jury.

The course followed in the New York State courts is shown in the cases about to be cited, and furnishes what, in our judgment, is the best solution of the difficulty.

*Papenheim* vs. *Metropolitan Elevated Railroad*, 128 N. Y., 436 (1891).

This action was brought to perpetually enjoin the elevated railroad companies from occupying their railway in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from the defendants the loss and damage sustained by reason of the past operating of the railroad. It was found that the defendants were authorized by certain acts of the Legislature to exercise the right of eminent domain and thus to acquire plaintiff's easements, if necessary, and that the defendants had like authority to build the railway, but there was nothing in the acts giving the defendants any authority to take the plaintiff's property without compensation. Judgment was rendered for the plaintiff, and it was provided that *the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by the plaintiff of a deed conveying to them the plaintiff's interest in the easement taken by the defendants.*

The following is a summary of what was held by the Court of Appeals, so far as the same may be applicable to the present case:

It was held that the elevated railroad structure was as to the plaintiff an illegal structure and inconsistent with the use of the avenue as a public street. That at the time of building the railroad the defendants committed a trespass upon the property, which trespass had been continued from the time when the road was built up to the time of the judgment; that by continuing the trespass the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action.

> "In an action at law the owner of the property
> "interfered with or trespassed upon cannot recover
> "damages to his premises based upon the assump-
> "tion that such trespass is to be permanent. He

" can recover only the damages which he has sus-
" tained up to the commencement of the action.
" The judgment entered for the damages sustained
" does not operate as a purchase of the right to
" continue the trespass. But the owner may re-
" sort to equity for the purpose of enjoining the
" continuance of the trespass, and to thus prevent
" a multiplicity of actions at law to recover dam-
" ages; and in such an action the Court may de-
" termine the amount of damage which the owner
" would sustain if the trespass were permanently
" continued, and it may provide that, upon pay-
" ment of that sum, the plaintiff shall give a deed
" or convey the right to the defendant, and
" it will refuse an injunction when the de-
" fendant is willing to pay upon the receipt of a
" conveyance. The Court does not adjudge that the
" defendant shall pay such sum and that the plaintiff
" shall so convey. It provides that, if the convey-
" ance is made and the money paid, no injunction
" shall issue. If defendant refuses to pay the in-
" junction issues. It may be that, in the case of a
" railroad actually running its cars upon or through
" property of another, it would not be justified in
" refusing to pay upon the delivery of the convey-
" ance, and, instead thereof, submitting to an injunc-
" tion. Public interests might have a right to be
" heard in that respect. But it is enough to say that,
" in the case where permanent damage is to be paid,
" there is a condition that a conveyance shall be
" made, and the defendant thus secures title to the
" property used. In cases where the owner wishes
" to actually stop the further trespass, and where the
" defendant has no legal right to acquire the prop-
" erty, such condition would not be inserted, and an
" injunction would issue upon the right of the
" owner being determined (Henderson *vs.* Central
" Railroad Co., 78 N. Y., 423).

"The plaintiff, if he receive the amount of the "permanent damage, is by the Court compelled to "convey the interest to the defendant, which the "defendant pays for in that way. Condemnation "proceedings are thus avoided. It is conclusively "determined that the trespass is to be continuous, "and defendant concedes it when it avails itself of "the condition and pays the permanent damage in "order to receive the conveyance. It is only in "this way that the owner recovers as for a per-"manent damage to his property.

"In a case where the defendant has no power to "condemn the property, if the owner in that event "proceeds in equity he recovers only his damage "up to the entry of the judgment, and at the same "time secures an injunction which prevents the "future trespass. If the owner sue at law he "recovers his damages, as stated,"

Other elevated railroad cases that may be cited are:

*Hughes* vs. *Metropolitan Elevated R. R. Co.* 130 N. Y., 28.

*Thompson* vs. *Metropolitan Elevated R. R. Co.*, 130 N. Y., 363.

*Mitchel* vs. *Metropolitan Elevated R. R. Co.*, 134 N. Y., 14.

See also—

*Story* vs. *N. Y. Elevated R. R. Co.*, 90 N. Y., 123.

*Lahr* vs. *N. Y. Elevated R. R. Co.*, 104 N. Y., 268.

*Pond* vs. *Metropolitan Elevated Railroad Co*, 112 N. Y., 186.

*Kernochan* vs. *Metropolitan Elevated Railroad Co.*, 161 N. Y., 344.

Other cases, not against the elevated railroad companies, involving similar principles may be referred to:

*Amerman* vs. *Dean*, 132 N. Y., 355.
*Stowers* vs. *Gilbert*, 156 N. Y., 604.
*Uline* vs. *N. Y. C. & H. R. R. Co.*, 101 N. Y., 98.
*Henderson* vs. *N. Y. C. R. Co.*, 78 N. Y., 423.

*Amerman* vs. *Dean*, 132 N. Y., 355, related to certain covenants in conveyances which ran with the land, restricting its use in certain respects. This action was for a permanent injunction and for damages. It was held that while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it inequitable to deprive a grantee of the privileges of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed.

The trial Court refused a permanent injunction, but awarded damages and an injunction until the damages should be paid, and this judgment was affirmed by the Court of Appeals.

The elevated railroad cases were distinguished on the theory that they were unlawful structures, amounting to a nuisance; that being a nuisance, the defendant was under a legal obligation to remove it, and the law would not presume that he would not do so; for that reason damages could only be recovered up to the time of the commencement of the action. In the present case, however, the building was not unlawful or a nuisance, and there was, consequently, no presumption that it would be abated or discontinued.

"This action is in equity, and one of the objects "sought is to avoid a multiplicity of actions which "might be brought in case only past damages could "be recovered.

"*We see no reason why permanent damages may not* "*be awarded. This right is recognized by the recent* "*cases.*"

The Court then refers to the *Pappenheim* case, and quotes therefrom.

*Stowers* vs. *Gilbert*, 156 N. Y., 600.

This was an action to restrain the defendant from erecting a wall alleged to encroach upon the plaintiff's land, and to recover damages for the alleged trespass.

The following is quoted from the opinion:

"The rule of damages is settled in this State as "trespasses on land.

"In a case where the defendant has the power to "condemn the property he has entered upon (illus- "trated in the elevated railway cases), the plaintiff "proceeds in equity for injunction or for his per- "manent damages. The plaintiff, if he receives the "amount of the permanent damages, is by the Court "compelled to convey the interest to the defendant, "which the latter pays for in that way, and condem- "nation proceedings are thus avoided.

"It is conclusively determined that the trespass "is to be continuous, and the defendant concedes it "when he avails himself of the condition and pays "the permanent damage in order to receive the con- "veyance. It is only in this way that the plaintiff "recovers as for a permanent damage to his property "(Pappenheim *vs.* M. E. R. Co., 128 N. Y., 436, 444,

" 445; New York National Exchange Bank *vs.* M.
" E. R. Co., 108 N. Y., 660).

" In a case like the one above, where the defend-
" ant has no power to condemn the property he
" has entered upon, two remedies are open to the
" plaintiff—an action at law for damages, and a
" suit in equity for an injunction and damages.

" In the action at law only such temporary dam-
" ages as are recoverable as have been sustained
" up to the time of the commencement of the
" action, and the plaintiff may bring successive
" actions until the defendant abates the nuisance
" (Uline *vs.* N. Y. C. & H. R. R. R. Co., 101 N. Y., 98;
" Pappenheim *vs.* M. E. R. Co., 128 N. Y., 436;
" Pond *vs.* M. E. R. Co., 112 N. Y., 186; Plate *vs.*
" N. Y. C. R. R. Co., 37 N. Y., 472; Mahon *vs.* N.
" Y. C. R. R. Co., 24 N. Y., 658).

" In the suit in equity, which is the remedy in-
" voked in this case, the plaintiff recovers only his
" damages up to the entry of the judgment, and at
" the same time secures an injunction which pre-
" vents the future trespass (Pappenheim *vs.* M. E.
" R. Co., 128 N. Y., 436, 445).

" The wall erected by defendant upon plaintiff's
" land is a nuisance and the defendant is under
" legal obligation to remove it, and it is not to be
" presumed he will seek to continue it permanently
" in violation of the injunction of the court, there-
" by subjecting himself to damages in contempt
" proceedings, or ejectment.

" Damages in the present action are not to be
" awarded upon the assumption of permanent in-
" jury, as the judgment does not and cannot
" operate as a purchase of the right to have the
" wall remain as at present constructed.

"The rule of damages in cases of private tres-
"pass and nuisance has been so exhaustively
"examined in the able opinion of Judge Earle in
"Uline *vs.* N. Y. C. & H. R. R. R. Co. (101 N. Y.,
"98), that it is quite unnecessary to review the
"authorities in detail."

## TENTH POINT.

**It follows from these considerations that the decree of the Court below allowing a perpetual injunction was erroneous and should be reversed upon such terms and conditions and with such instructions as to this Court may seem proper.**

Dated New York, December 1, 1901.

JOHN WHALEN,
Corporation Counsel.

GEORGE L. STERLING,
Of Counsel.

## PART IV.

THIS CONSISTS OF THE STATUTES OF THE STATE OF NEW YORK AUTHORIZING THE CITY OF NEW YORK TO EXERCISE THE RIGHT OF EMINENT DOMAIN APPLICABLE TO THE PRESENT CASE, AND IS ALSO CALLED APPENDIX I.

POOR COPY

# APPENDIX I.

## Laws of 1877, Chapter 445.

An Act to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges heretofore taken or used, or which may be hereafter taken or used, by said city, to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

Passed June 15, 1877, three-fifths being present.

[The title of this act was amended by chapter 516 of the Laws of 1879 so as to make it read as follows :]

An Act to provide a further supply of pure and wholesame water for the city of New York, and to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges, heretofore taken or used, or which may be hereafter taken or used, by said city to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows :*

Acquisition of land for obtaining water supply by Commissioners of Public Works.

Section 1. In all cases where the commissioner of public works of the city of New York shall have heretofore entered upon, taken or used, or shall hereafter enter upon, take or use, or shall deem it necessary to enter upon, take or use the waters of any lake, or any

upland, or land under water, or water rights or privileges, or any incorporeal hereditaments, or any other property, for the purpose of maintaining, preserving or increasing the supply of pure and wholesome water for the use of said city, the said commissioner is authorized, for and in behalf, and in the name of the mayor, aldermen and commonalty of the city of New York, in the manner hereinafter prescribed, to acquire all rights, titles and interests in and to such real estate, by whomsoever the same may be held, enjoyed or claimed, and to pay for and extinguish all claims or damages on account of such rights, titles or interests, or growing out of such taking or using.

Sec. 2. The said commissioner, his engineers, surveyors and such other persons as may be necessary to enable him to perform his duties under this act are hereby authorized to enter upon any land or water for the purpose of making surveys or examinations, and to agree with the owners, occupants or claimants of any real estate which may have been required or damaged, or which hereafter may be required or damaged, in carrying into effect the provisions of this act, as to the amount of compensation to be paid to such owners, occupants or claimants, and the time and manner of such payment. And in any case such real estate shall be owned, occupied or enjoyed by the people of this state, or by any county, town or school district within this state; such rights, titles, interests or properties may be paid for upon agreement respectively with the commissioners of the land office, who shall act for the people of this state, with a chairman and a majority in numbers of the board of supervisors of any county who shall act for such county and with the supervisor and commissioners of highways in any town who shall act for such town, and with the trustees of any school district that shall act for such district.

Proceedings in case parties cannot agree.

Sec. 3. In case the said commissioner of public works is unable to agree with the said owner or owners, occupant or occupants, claimant or claimants of any such real estate, or with any or either of such officers as to the sum or sums to be paid for the acquisition or extinguishment of any such real estate, or of any right, title or interest thereto or therein, for carrying into effect the purposes of this act, the said commissioner of public works shall have the right to acquire such real estate, or to extinguish any such right, title or interest thereto or therein, for the mayor, aldermen and commonalty of the city of New York in the manner and by the special proceedings hereinafter provided.

Petition for appointment of Commissioners.

Sec. 4. For the purpose of acquiring such real estate or of extinguishing any right, title, interest thereto or therein, and the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty of the city of New York may present a petition praying for the appointment of commissioners of appraisal to the supreme court, at any general or special term thereof, held in the district in which the real estate described in the petition may be situated, such petition shall be signed and verified according to the practice of such court. It must contain a general description of the real estate which the said commissioner seeks to acquire, and of the rights, titles and interests therein which he seeks to extinguish, and also a general statement of the names and places of residence of the parties, as far as the same can by reasonable diligence be ascertained, who own, occupy or enjoy, or who claim to own, occupy and enjoy, any such real estate, or any right, title or interest therein, and if any of such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots, or persons of unsound mind, or are unknown, that fact must be stated, together with such other allegations

and statements of liens or incumbrances upon such rights, titles and interests as the said commissioner may see fit to make. A copy of such petition, with a notice of the time and place the same will be presented to the Supreme Court, must be served on all persons whose interests are to be affected by the proceedings at least ten days prior to the presentation of the same to the said Court.

1. If the person on whom such service is to be made resides in this state and is not an infant, idiot, or person of unsound mind, service of a copy of such petition and notice must be made on him, or his agent or attorney, authorized to contract for the sale or surrender of the real estate described in the petition, personally, or by leaving the same at the usual place of residence of the person on whom such service must be made as aforesaid with some person of suitable age.

2. If the person on whom such service is to be made resides out of the State, and has an agent residing in this State, authorized to contract for the sale or surrender of the property described in the petition, such service may be made on such agent, or on such person, personally, out of the State, or it may be made by publishing the notice, stating briefly the object of the application and giving a description of the property to be taken or effected, in the state paper, and in a paper printed in the county in which the real estate taken or effected is situated, once in each week for one month next previous to the presentation of the petition; and if the residence of such persons residing out of this state, but in any of the United States, or any of the British colonies in North America, is known, or can by reasonable diligence be ascertained, the said commissioner must, in addition to such publication as aforesaid, deposit a copy of the petition and notice in the post-office, properly folded and directed to such person at the post-office nearest the place of res-

idence at least two weeks before presenting such petition to the court, and pay the postage chargeable thereon in the United States.

Minor. 3. If any person on whom such service is to be made is under the age of twenty-one years, and resides in this state, such service shall be made as aforesaid on his general guardian, or if he has no such guardian, then on such infant, personally, if he is over the age of fourteen years, and if under that age, then on the person who has the care of such infant, or with whom such infant resides.

Idiots. 4. If the person on whom such service is to be made is an idiot, or of unsound mind, and resides in this State, such service may be made on the committee of his person or estate, or if he has no such committee, then on the person who has the care or charge of such idiot or person of unsound mind.

Unknown owners. 5. If the person on whom such service is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court by publishing a notice, stating the time and place the petition will be presented, the object thereof, with a general description of the property to be affected by the proceedings, in the state paper, and in a paper printed in the county where the property is situated, once in each week for two weeks previous to the presentation of such petition.

Infants without guardians. 6. In case any party to be affected by the proceedings is an infant, idiot or person of unsound mind, and has no general guardian or committee, the court shall appoint a special guardian or committee to attend to the interests of such person in the proceedings; but if a general guardian or committee has been appointed for such person in this state, it shall be the duty of such general guardian or committee to attend to the interests

of such infant, idiot or person of unsound mind, and all notices required to be served in the progress of the proceedings, may be served on such general or special guardian or committee.

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7. In case the people of this state, or any county of this state, or any town in this state, or any common school district within this state, or any corporation organized under the laws of this state, shall own, occupy or enjoy any real estate which is to be acquired or affected in carrying into effect the purposes of this act such notice and petition may be served in the manner hereinbefore prescribed, upon the following officers respectively: upon the clerk to the commissioners of the land office, in behalf of the people of the state; upon the clerk of the board of supervisors of any county, in behalf of such county; and upon the supervisor of any town, and the commissioners of highways in any town, in behalf of such town; upon the trustees of any school district, in behalf of such district; and upon the acting chief executive officer of any corporation, in behalf of such corporation.

8. In all cases not herein otherwise provided for, service of orders, notices and other papers in the special proceedings authorized by this act, may be made as the supreme court shall direct.

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9. Whenever there shall be one or more of the estates enumerated in article one of title two of chapter one of the second part of the Revised Statutes, entitled "Of the creation and division of estates," in any real estate, as the term real estate is defined in this act, required by the city of New York for the purpose of this act, such estate and real estate may be acquired by said city by means of the special proceedings authorized by this act.

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In every such case the commissioner of public works, in addition to the statements now required by the said

act shall set forth and state in his petition the facts, so far as the same can with reasonable diligence be ascertained, in relation to any such estate, and the person, persons, or class of persons then in being or not in being, who are or may become entitled in any contingency to any estate as aforesaid in such real estate, and may pray that such estate may be acquired and such persons may be bound by the said proceedings; and thereupon the court to whom such petition is presented, if there be no attorney appearing in their behalf, shall appoint some competent and disinterested attorney or officer of the court to appear in such proceedings and represent the rights, interests and estate of the person, persons, or class of persons aforesaid in such real estate, and to protect the same on the appraisal and proceedings aforesaid; and it shall be the duty of the court, on or after the confirmation of the report of appraisal, to ascertain by such report or by a reference for that purpose or otherwise, in its discretion, the rights, interest and estate of such person, persons or class of persons, in the real estate so appraised and in the compensation awarded therefor, and to make an order determining the amount of share of such compensation to which such person, persons or class of persons are or may become entitled on account of such estate, as the same shall arise or become vested in them respectively, and to direct and to provide for the payment, investment or securing thereof, for the benefit of the person, persons or class of persons aforesaid, who are or who may, in the contingency upon which such estate arises, become entitled thereto; upon the payment or deposit by the comptroller of the city of New York of the sums to be paid for the acquisition of such real estate in the manner provided in section eight of this act, and in the manner directed by order of Court the said commissioner of public works, for and in behalf of the said the mayor, aldermen and commonalty of the city of New York, shall be entitled to enter upon, take

possession of and use the said real estate for the purposes indicated in this act, and such person, persons or class of persons as are or may become entitled to such estate shall be barred of and from all right or claim in and to such land adverse to its use and occupation by the said commissioner or by the said the mayor, aldermen and commonalty.

apply to proceedings not completed.

Sec. 2. This act shall take effect immediately, and the provisions hereof shall apply to all special proceedings heretofore brought, under chapter four hundred and forty-five of the laws of eighteen hundred and seventy-seven, and the various acts amendatory thereof, and which shall not be completed at the date of the passage of this act.]

*The part* (*subd.* 9), *within brackets, added by chapter* 582 *of the Laws of* 1881.

Appointment of commissioners.

Sec. 5. On presenting such petition to the supreme court as aforesaid, with proof of service of a copy thereof and notice as aforesaid, all or any of the parties whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county (or some adjoining county) where the property to be appraised is situated, commissioners to ascertain and appraise the compensation to be made to the parties interested in the real estate proposed to be taken or affected or theretofore taken or affected in such county for the purposes indicated in this act, and to fix the time and place for the first meeting of the commissioners.

Sec. 6. The said commissioners shall take and subscribe the oath prescribed by the twelfth article of the constitution. Any one of them may issue subpœnas and administer oaths to witnesses, and any such witness sworn and examined and testifying falsely shall be deemed guilty of perjury, and shall be liable to the pains and penalties imposed by law for that offense. Such subpœnas may be served within this State by any person and must be served by any sheriff or constable when thereunto required; in case of the failure or refusal of any witness so subpœnaed to obey such subpœna, or to answer any question or to produce any books or papers when thereunto required by a majority of the said commissioners, the commissioners, or a majority of them, shall report such failure or refusal to a justice of the supreme court in the said judicial district, in which such commissioners were appointed, before whom the same proceeding shall thereupon be had, as though such failure or refusal were that of a witness duly subpœnaed to appear and testify upon the trial of an action before such justice, and such justice shall in all respects proceed as though such subpœna had issued out of the court in which he presides; a majority of such commissioners may adjourn the proceedings before them, from time to time in their discretion. Whenever they meet, except by appointment of the court, or pursuant to adjournment, they shall cause reasonable notice to be given to the parties interested, or their agent or attorney. They shall view the property described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all having an opportunity to be present, shall, without any unnecessary delay, and before proceeding to the examination of any other claim, ascertain and determine the compensation which ought justly to be made by the said mayor, aldermen and commonalty of the city of

Powers and duties of commissioners.

New York, to the owners or the persons interested in the rights, titles and privileges to be acquired or affected by the said proceeding. They, or a majority of them shall also determine what sum ought to be paid to the general or special guardian or committee of an infant, idiot, or person of unsound mind, or to an attorney appointed by the court to attend to the interests of any unknown owner or party in interest, not personally served with notice of the proceedings and who has not appeared, for costs, expenses and counsel fees. They, or a majority of them, shall also (but not in excess of any request therefor made in behalf of the city) determine the height to which the waters of any lake or natural stream, concerning which such proceedings are instituted, may be raised, and the point to which such waters may be drawn down by the said, the mayor, aldermen and commonalty of the city of New York, such determination to be made before any award of damage shall be made on account of such proposed raising or depressing of such waters The said commissioners shall make a report of their proceedings to the supreme court, with the minutes of the testimony taken by them, if any; and they shall be entitled to the payments hereinafter provided for their services and expenses, to be paid from the fund hereinafter provided.

Sec. 7. On such report being made by said commissioners, the counsel to the corporation of the city of New York shall give notice to the parties, or their attorneys, to be effected * by the proceedings, according to the rules and practice of said court at a general or special term thereof for the confirmation of such report, and the court shall thereupon confirm such report, and shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal and a general description of the real estate appraised,

* So in the original.

for which compensation is to be made; and shall also direct to whom the money is to be paid, or in what bank and in what manner it shall be deposited by the comptroller of the city of New York.

Sec. 8. A certified copy of the order so to be made as aforesaid shall be recorded, at full length, in the office of the clerk of the county in which the real estate described in it is situated, and thereupon, and on the payment or deposit by the comptroller of the city of New York of the sums to be paid as compensation for the acquisition of such real estate, or for the extinguishment of any right, title or interest therein, and for the costs, expenses and counsel fees as directed by said order, the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty, shall be entitled to enter upon, take possession and use the said real estate for the purposes indicated in this act and all parties mentioned in this act who shall have been made parties to the proceedings, together with all parties claiming or to claim, by, through or under them, shall be forever divested and barred of all right, estate and interest in such real estate, and of all claim for any damage on account of the taking, using or affecting of such real estate, or of any right, title, interest therein. All real estate acquired by the said mayor, aldermen or commonalty of the city of New York, under and pursuant to the provisions of this act, shall be deemed to be acquired for public use. Within twenty days after the confirmation of the report of the commissioners, as provided for in the seventh section of this act, either party may appeal, by notice, in writing, to the other, to the supreme court from the appraisal and report of the commissioners. Such appeal shall be heard by the supreme court at any general or special term thereof on due notice thereof being given according to the rules and practice of said court. On the hearing of

To be recorded.

Appeal.

such appeal, the court may direct a new appraisal and determination of any question passed upon before the same or new commissioners in its discretion, but from any determination of the general term, either party, if aggrieved, may take an appeal, which shall be heard and determined by the court of appeals. In case of a new appraisal, the second report shall be final and conclusive on all the parties interested. If the amount of compensation to be made by the said city is increased by the second report, the difference shall be a lien on the real estate appraised and shall be paid by the comptroller of the city of New York to the parties entitled to the same, or shall be deposited in bank as the court may direct, and if the amount is diminished, the difference shall be refunded to the said the mayor, aldermen and commonalty of the city of New York by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same. Such appeal shall not affect the possession by the city of New York of the real estate appraised; and when the same is made by others than the said city it shall not be heard except on the stipulation of the party appealing not to disturb such possession.

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Sec. 9. If there are adverse and conflicting claimants to the money, or any part of it to be paid as compensation for the real estate taken or affected, the court may direct the money to be paid into the said court by the said comptroller, and may determine who is entitled to the same and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and order are to be made.

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Sec. 10. The court shall appoint some competent person to appear for and protect the rights of any party in interest who is unknown, or whose residence is unknown, and who has not appeared in the proceeding by an attorney or agent. The court shall also have

power, at any time, to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, or to cause new parties to be added and to direct such further notices to be given to any party in interest as it deems proper, and also to appoint other commissioners in place of any who shall die or refuse or neglect to serve or be incapable of serving.

Proceedings in case of defective titles.

Sec. 11. If, at any time, after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defected, the said city may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the said city, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions and proceedings against the said city on account thereof on the comptroller of said city paying into court such sum as the court may direct, to pay the compensation therefore when finally ascertained, and in every such case, the party intrusted in such real estate may conduct the proceedings to a conclusion if the said city delays or omits to prosecute the same. And if, at any time, the said city shall require, for the purpose indicated in this act, to acquire any additional real estate, or to extinguish any other or further rights, titles, interested therein in addition to that which it has already acquired or extinguished, such city may acquire such additional real estate or extinguish such additional rights, titles, interests therein, or any such real estate, or any right, title or interest therein, which it now uses or occupies, or which it has heretofore used or occupied, by purchasing the same of the persons or parties owning the same, or interested therein, or

Additional real estate, acquisition of.

affected by such proceedings, and by paying to such parties such damage as they may sustain by reason thereof if the amount of such compensation or damages can be agreed upon between such commissioner of public works and such persons or parties; and if such commissioner of public works shall, for any cause, be unable to agree for the purchase of such real estate, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or rights already acquired or extinguished, or attempted to be acquired or extinguished, shall, for any cause, prove defective or imperfect, then and in every such case such commissioner of public works may proceed to acquire and perfect title to such real estate or rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed.

Sec. 12. The commissioners of the land office shall have power to grant to the said city any real estate belonging to the people of this state which may be required for the purposes indicated in this act, on such terms as may be agreed on between them and the said commissioner of public works, always, however, reserving and maintaining the rights of the people and riparian owners to go to the water at any point to which the same may be drawn; and if any real estate of any county, town or school district is required by such city for the purposes of this act, the majority of the board of supervisors acting for such county, or the supervisor of any such town, with the commissioners of highways therein acting for such town, or the trustees of any school district acting for such district, may grant or surrender such real estate for such compensation as may be agreed upon between such officers, respectively, and the said commissioner of public works.

Sec. 13. In case any real estate required by said city for the purposes of this act shall be vested in any trustee not authorized to sell, release and convey the

same, or in any infant, idiot or person of unsound mind, the supreme court shall have power by a summary proceeding, on petition to authorize and empower such trustee or general guardian or committee of such infant, idiot or person of unsound mind, to sell, convey or surrender the same to the said city on such terms as may be just; and in case any such infant, idiot or person of unsound mind has no general guardian or committee, the court may appoint a special guardian or committee for the purpose of making such sale, surrender or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath, and if the court is satisfied that such terms are just to the party interested in such rights, titles, interests or property, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of such rights, titles, interests or property having legal power to sell, surrender and convey the same.

Lands already taken, proceedings for acquiring title to, etc.

Sec. 14. In all cases where the commissioner of public works shall have heretofore entered upon, taken or used, any real estate, either with or without the license of the owner thereof, for the purpose of increasing the supply of water for the city of New York, and the title to such real estate shall not have been acquired by said city either by purchase or by any proceedings under any existing law and the said city, by any of its officers, agents or employees, shall be in possession thereof at the time this act shall take effect, and such possession shall be continued for the period of sixty days thereafter, such possession shall be deemed an election on the part of said city to take such real estate under and pursuant to the provisions

of this act, and in that case it shall be the duty of the corporation counsel, at the expiration of said sixty days, to make the necessary application for the appointment of commissioners pursuant to the provisions of this act to appraise the damages and compensation to be paid for the taking and using of the same. The performance of such duty may be enforced by the supreme court by mandamus on the application of any owner or claimant of the real estate so taken or used, and upon the hearing before the commissioners appointed upon such application they shall, if requested by said owners or claimants, also appraise and determine the amount of damages sustained by said owners or claimants respectively by reason of any use or occupation of the said real estate by said city, or any of its officers or agents, before the taking of such application. The said commissioners shall in their report state the amount of damages so ascertained and determined by them, and the amount thereof shall form a part of the amount required to be paid by said city before the right and title to the real estate specified in said report shall be vested in said city as hereinbefore provided. Upon such hearing all of the provisions of this act in relation to compelling the attendance of witnesses, and the examination thereof, shall apply to the claim for damages growing out of such use and occupation.

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Sec. 15 As to any damages which may have accrued to the owner or claimant of any real estate, as to which the proceedings provided by this act may be instituted, before such proceedings shall have been instituted, this act shall not be taken or construed to deprive any party of a right to a trial by jury of the question of such damage, and the said commissioners shall estimate and determine such damages, and the compensation to be made therefor, only upon the consent of all the parties thereto. Such consent, however, shall be conclusively

presumed as against any party who shall appear and take part in the proceedings to determine the amount of such damage, without first entering an objection to the determination* thereof by such commissioners. In absence of such objection, but not otherwise, the said commissioners shall proceed to final determination of such question.

Term "real estate" defined.

Sec. 16. The term real estate, as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all water rights or privileges, and any and all easements and incorporeal hereditaments, and every estate, interest and right, legal and equitable, in lands or water, including terms for years, and liens thereon by way of judgment, mortgage, or otherwise, and also all claims for damage to such real estate.

Compensation of Commissioners, Clerks, surveyors, etc. employment of. Comptroller to pay.

Sec. 17. The commissioners appointed in pursuance of this act shall receive as compensation the sum of ten dollars per day for each day actually employed. They may employ the necessary clerks and surveyors. The salaries of the commissioners and of their employees, and the necessary traveling expenses and other expenses incurred in and about such special proceedings, shall be paid by the said comptroller, as provided for in this act, on the certificate of the commissioner of public works of the city of New York.

Waste of water, prevention of.

Sec. 18. For the purpose of preventing any waste of water, the commissioner of public works of the city of New York is hereby authorized to construct such aqueducts, reservoirs, dams, sluices, canals and appurtenances as may be necessary to collect or retain the water in or from any lakes or streams which may be taken under the operation of this act, and use such waters as the wants and necessities of said city may require. Provided that nothing contained in this or in any exist-

* So in the original.

ing act shall authorize or permit any water in excess of the ordinary flow thereof to be drawn from Lake Mahopac and Lake Gleneida, in the town of Carmel, and county of Putnam, between the first day of March and the first day of September in any year. And provided also that nothing in this or in any existing act contained shall be so construed as to interfere with any existing right to catch fish, obtain ice, or keep, use and maintain boats in or upon any natural lake or pond which may be acquired under this act; nor shall it be so construed as to destroy any existing right of riparian owners upon such lakes and ponds to use the waters thereof, or to build upon the shores thereof, except as such rights may be affected by the raising or lowering of the waters of such lake or ponds, as hereinbefore prescribed.

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Sec. 19. It shall be the duty of the comptroller of the city of New York, and he is hereby authorized and directed, on requisition of the commissioner of public works of the city of New York, to raise, from time to time, on bonds of said city, amounts of money sufficient to pay the sums which may be necessary, from time to time, to be paid for the acquisition of any real estate, or for the extinguishment of any right, title, interest therein, to be acquired or extinguished under this act, together with all expenses necessarily incurred in surveying, locating and acquiring title to real estate, or extinguishing claims for damages thereto; and also such sums as, from time to time, may be found necessary for the construction of aqueducts,* reservoirs, dams, sluices, canals and appurtenances as are now in process of construction; and all such payments shall be made by the comptroller on the certificate of the commissioner of public works of the city of New York; provided, however, the amount so raised shall not, in any one year, exceed the limitations which, by law, may

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* So in the original.

be or may have been imposed as to the amount of expenditure to be made by the commissioner of public works.

Sec. 20. The bonds so to be issued by the comptroller of the city of New York, in pursuance of this act, shall be entitled "additional Croton water stock of the city of New York," shall bear interest at the rate of not exceeding seven per cent. per annum, and shall be redeemable in not less than ten nor more than fifty years, as the said comptroller shall determine to be for the best interest of the said city; and the board of aldermen of the city of New York is hereby authorized and directed to raise, from time to time, by tax upon the estates, real and personal, subject to taxation in the city and county of New York, the sum or sums of moneys which may be required to pay the interest on said bonds and to redeem them at maturity. The mayor and comptroller of said city are hereby authorized and directed to sign said bonds, and it shall be the duty of the clerk of the board of aldermen to countersign the same and to affix thereto the seal of the city. Such bonds shall not be disposed of at less than the par value thereof.

Title of bonds.
Interest.
When redeemable.
Payment provided for.
Execution of bonds.
Disposition of.

Sec. 21. The said city or New York is hereby required to repair and forever maintain the highways built or in process of construction by the said city around the new reservoir, on the middle branch of the Croton river, in the town of South East.

Highways, repair of.

Sec. 22. All actions for the recovery of real property, or of any real estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real estate, brought under the provisions of this act, shall be brought and tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in cases provided by statute.

Actions, places of trial of.

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Sec. 23. If in any particular it shall at any time be found necessary to amend any pleading, proceeding, process or action, or to supply any defect therein, arising in the course of any special proceeding authorized by this act, the same may be amended or supplied in such manner as shall be directed by the supreme court, which is hereby authorized to make such amendment or correction.

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pealed.

Sec. 24. All acts and parts of acts inconsistent with this act are hereby repealed, provided that nothing herein contained shall at any time be understood, held or construed to repeal any part of chapter fifty-six of the laws of eighteen hundred and seventy-one, entitled "An act to provide a further supply of pure and wholesome water for the city of New York," passed February twenty-seventh, eighteen hundred and seventy-one, excepting the fourth section thereof, which is hereby repealed, nor to repeal the act amendatory of said act, passed April sixth, eighteen hundred and seventy-one, being chapter three hundred and twenty-eight of the laws of eighteen hundred and seventy-one (*as amended by laws of* 1879, *chapter* 516).

Sec. 25. This act shall take effect immediately.

## PART V.

THIS CONSISTS OF A DIGEST OF ALL THE TESTIMONY AND IS ALSO CALLED APPENDIX II.

# APPENDIX II.

## Digest of all the Testimony.

Witness, Samuel Pine (fol. 31).

Samuel Pine is one of the complainants, a citizen of the United States and of the State of Connecticut. The Byram river bounds his land for a distance of about 3,725 feet on the east. He values it at $50,000. He is working a heavy deposit of feldspar on the property, and uses the water of the Byram river for "all "general farm use, house use and mill use for steam" (fol. 34).

Pine, being recalled by the defendant's counsel, testified, in substance, as follows (fol. 391):

His father bought the farm in 1870 for $13,000 or $13,500. It consists of 102 acres. "We generally raise "about two to three acres of potatoes, about seven or "eight acres of corn; that is our average; * * * "at present we have got four cows, pair of oxen and, I "think, seven horses; * * * since we opened the "quarry, about five years ago, we have cut down our "cattle stock."

He doesn't get the water for the cattle in the winter from the Byram river, but from a little brook behind the barn. He uses the Byram river "for the mill and "summer pasture and house purposes." By using it for the mill he means to supply the boiler with water, the mill being run by steam. He has a canal leading from the river to a cistern, and from the cistern he draws the water for the boiler. The mill runs from ten to twelve hours a day and sometimes all night. The Byram river is the only source of supply of water

for the boiler, and he had always had enough water for that boiler. He owns only on one side of the river.

[*Note*—It is thus to be observed that this plaintiff does not testify to any damage or injury whatever from the diversion of the water.]

Witness, Frederick Muller (fol. 35).

He is the other complainant owning the other farm in Connecticut. The Byram river runs right through his place, so that he owns lands on both sides of it for a distance, counting both sides, of 2,290 feet. He had improved the place some since he bought it. Some of the buildings were going to pieces "a little bit," and he improved them and he improved the land, which was wild. He values the farm at about $8,000. His cattle went regularly for water to the Byram river, and he used it for general farm use.

Mr. Muller was called in his own behalf again at folio 348, testifying substantially as follows:

He had noticed that the water in the West Branch of the river was getting less and less; that in the summer of 1899 the water was almost to a standstill. He could walk through it. There was no movement in it. He had never seen it so low as that. The East Branch of the Byram river flows through his farm. That is, the two streams unite on his farm. Prior to two years ago there was always more water coming through the East stream than the West stream. Before that time the West Branch had the most water in the summer time. After the diversion, and in the dry summer of 1899, the East Branch was better than the West Branch (fol. 352), "but the water gets pretty low in the East Branch during the summer."

(*Cross-examined*, fol. 353):

Mr. Muller's land is a little above Mr. Pine's. The East and West Branches of the river meet right on the

upper or northern line of his farm, so that both branches of the river flow through his farm. There is no dam on the property and the water is used for ordinary farming purposes. There are about 45 acres. The cattle get water out of the river.

"*Q.* Have you ever seen the time when there wasn't water enough below the point where the East Branch of the Byram strikes the West Branch to water cattle?

"*A.* No; I have not" (fol. 356).

Mr. Muller, being recalled by the defendant's counsel, testified (fol. 397) that he used the waters of Byram river for his cattle; he kept twelve head of horned cattle, two of horses. They go to the brook to drink, and always have. The brook is accessible from the fields.

"*Q.* And there has always been water enough in that river to water those cattle, has there not?

"*A.* So far; yes, sir" (fol. 398).

[*Note.*—It thus appears that absolutely no damage whatever has been shown to have resulted from the diversion of water, from Mr. Muller's own testimony, which amounts to this, that he simply uses the water for ordinary farm purposes, particularly for the watering of his cattle, and that there has always been enough water there for that purpose. Neither of the complainants, therefore, show or claim, in their testimony, any damage from the diversion of the water.]

Witness GEORGE W. BIRDSALL, for the complainant (p. 13A).

Mr. Birdsall is a civil and mechanical engineer; Chief Engineer of the Croton Aqueduct for the City of New York and has been in charge of and control of the water supply of the City of New York since 1872, and is familiar with the Byram river.

[*Note*—Here (p. 13B) the plaintiff's counsel offered in evidence chapter 445 of the Laws of 1877 of the

State of New York as amended to date. It may be noted that this is a general statute of the State of New York giving authority to the City of New York to exercise the right of eminent domain for the purpose of acquiring lands and other property interests for purposes of the water supply and providing for compensation to the persons injured. It is one of the general statutes of the State of which the Court will take judicial knowledge without the same being introduced in evidence.]

The other principal ones are—

Laws of 1883, ch. 490, and amendments.
Laws of 1893, ch. 189, and amendments.
Laws 1882, ch. 410, secs. 364–384 (The Consolidation Act).
Laws of 1897, ch. 378, secs. 468–518 (The Greater New York Charter).

Mr. Birdsall then proceeded to give a description of the Byram river and the area of the watershed which it will be unnecessary to repeat here, except that the area of the watershed in New York State is 8.66 square miles. This includes the area between the dam and the Connecticut line (see pp. 13B; 13C).

The dam erected by the City of New York across the Byram river is in Westchester County in the State of New York about 700 feet from the Connecticut line (fol. 9).

Mr. Birdsall then goes into certain facts as to the area of the watershed, the rainfall, the average flow, etc., which it is not necessary to review.

The stream runs along Pine's land 3,725 feet, taking the windings of the stream (fol. 13).

The fall of the stream from the upper part to the lower part of Mr. Pine's land is 26 7-10 feet (vol. 14).

Muller's farm is about three-quarters of a mile north of the north line of Pine's land and extends on both sides of the river 920 feet, and on the west side of the river 450 feet further north (fol. 16).

Mr. Birdsall testified (fol. 45) that with proper storage the City could obtain from the drainage area of 7.66 square miles from which the diversion is made, 7,600,000 gallons of water a day on an average, also (fol. 51–52), that the flow of the main or westerly branch would be about 8-12ths the flow of the main stream at the junction of the two streams.

Mr. Birdsall also testified that if the dam in question diverted all of the water above the dam it would decrease the stream above the junction of the east and west branch about one-half; below the junction about one-fourth (fol. 54).

Mr. Birdsall testified in effect (at fol. 55) that he did not know at what point Mr. Pine could erect a dam without encroaching upon the water rights of other people.

"*Q.* Do you know whether the City has purchased "that water right or the right to divert the stream in "so far as that particular water right is concerned?

"*A. It has paid all the damages for the diversion of the "stream above the Connecticut State line to this water "right*" (fol. 55).

Mr. Birdsall's testimony was continued at folio 69.

The minutes of a conference held April 28, 1897, between owners of property on Byram river and the Commissioner of Public Works were offered in evidence by the complainants. This begins at folio 71. The following is a summary:

The Byram river, from the dam at Portchester, where it enters Long Island Sound, to the New York

State line, is about 45,000 feet on each side. The City of New York has diverted the water from 8.66 square miles of the drainage area of this stream in New York just north of the Connecticut State line. The City of New York has settled, by private arrangement, with all the present mill owners on the stream, which involves, to a certain extent, the settlement of about 15,000 feet of this length of 45,000 feet of the Byram river. Of about 10,000 feet of the lower end of the river, half is in the State of New York and the other half in the State of Connecticut. North between this and the New York State line the whole of the river on both sides is in the State of Connecticut.

The City has settled with the mill owners and with parties who owned land contiguous to the stream on both sides. The City has paid $379,000 for about 15,000 feet. A portion of this 15,000 feet is not fully settled for, because the mill owners had rights of flowage, and the adjoining owners still have to be settled with in some form or shape. There are about 100 of these that have an interest in the balance of the stream. Most of them have small village lots alongside the flowage, so that they really have little interest. There are about 35 all told who have certain rights.

The City of New York has taken nothing but the use of the water. It has not condemned or taken any land (that is, in the State of Connecticut) (fol. 75). The water flows into the Kensico Reservoir, and the claims settled for are below the point at which the stream was diverted. Above that point is in the State of New York, where the City has taken more or less land (meaning by the exercise of the right of eminent domain) contiguous to the stream and is now taking more.

[*Note*—Here follows an argument or conversation between those present at the conference which can

hardly be called evidence of anything (fol. 76–114). It was objected to (fol. 115). We will note, however, the following]:

The Commissioner of Public Works asked this question at folio 77:

"*Q.* Do I understand that the diversion of this "stream takes all the water from the former bed of the "river?

"*A.* (By Counsel for the Complainants) "Roughly "speaking, I understand that during nine or ten "months of the year the diminution of the flow of the "water through the river would be almost nominal. "That during any period of the year when there was "a prolonged drought the flow of the river at the point "where the dam was placed by the City would be prac- "tically stopped. I am trying to make this as fair a "statement as I possibly can.

"(The Commissioner of Public Works) Do I under- "stand that if we settle for damages we may have in- "flicted now this is a settlement for all time, and that "we get a release to that effect, notwithstanding the "fact that at some future time we may be compelled to "take even more water than we take at present?

"*A.* (By Counsel for Complainants) Yes; the plan "is to give a general release of all our rights to any of "the water which may be diverted by the City. Under "this the City will be permitted to take all the water "north of its present dam, and might, very possibly, "in the future take it all."

Counsel for the complainants also stated (fol. 82) the following:

"The average price at which my people are willing "to settle would be about $1.50 a running foot for "each side of the river."

Referring to settlements made by the City with the mill-owners by which $376,000 was paid to them, counsel for the claimants stated as follows (fols. 83, 84):

"This settlement with the mill-owners was made "ten days ago, and they were paid. They have had "the water flow, almost as it had been accustomed to "flow, during some part of the time as it had been "accustomed to flow, and had the benefit of the invest- "ment of their money for ten years. No effort has "been made on the part of the City to make any set- "tlement with any of the property-owners whom I "represent.

"The City has deliberately attempted to take prop- "erty belonging to my clients, who are citizens of "another State, and whose property is in another "State."

Mr. Birdsall, being recalled for the complainants, testified at folio 122 in substance as follows:

If the City of New York diverted all of the water which flowed into the reservoir formed by the dam, the decrease in the flow of the Byram river, just above its junction with the East Branch, would be somewhere between two-thirds and one-half.

Within the State of New York the City of New York has taken condemnation proceedings along the line of the river and its branches by filing maps for more or less of the property. This has been done under the Condemnation Law known as chapter 445 of the Law of 1877 (fols. 137, 138).

The cost of the dam 500 feet from the State line—that is, of the dam alone, without any of its appurtenances—was about $45,000. The cost of getting the water to New York, that is, building the dam and the

whole matter, would be upwards of one million dollars (fols. 141, 142.)

Mr. Birdsall estimated at one time from the facts in his possession that if all of the water of the westerly Branch of the Byram river should be diverted, the damage to the complainant Pine would be $1,862.50, and to the complainant Muller $572.50 (fols. 144–145). This was all objected to as incompetent, improper and immaterial, and on the further ground that no opinion expressed by the engineer of the City Government would bind the City in any event, the City having no general agents.

[*Note.*—This, we believe, is the nearest approach to any evidence of the amount of money damage sustained. It can hardly be considered as evidence at all, nor, if it is admissible, is it entitled to much weight. It is not taken directly in the suit, but from some affidavit, and the surrounding circumstances are not shown. It assumes that all the water was diverted by the dam and Mr. Birdsall does not claim to be an expert on such questions. It is rather an estimate of what it would be reasonable and proper for the City to pay in order to get out of an embarrassing situation.]

Mr. Birdsall, on cross-examination, testified in substance, at folio 158, as follows:

All the action taken by the City (meaning, we presume, in condemnation proceedings) has been in the State of New York and above the East Branch of the Byram river. All the water that has been diverted has risen in the State of New York by drainage area or by springs, and the land that has been acquired has been within the State of New York and the diversion has taken place in the State of New York.

The dam was in operation on May 5, 1899 (fol. 162), and was diverting water then, and had been diverting water since about December, 1896.

It is the intention of the City authorities to divert more or less of the water at the dam all the year around. In the winter season most is diverted. It is also diverted in the summer. On May 5, 1899, there was no water flowing over the dam (fol. 164).

It also appears (fols. 164, 165) that for some seven years the water from the West Branch did not flow through complainants' land when the old dam just above the City's dam was being filled.

[*Note.*—That is, the complainants are in no worse condition now than they had been for some seven years previous to the building of the new dam, during which time, so far as appears, they made no complaint.]

The City of New York owns the fee of the land on which the dam was built. It was paid for in 1884 (fol. 166). In case of all the existing dams, mills and factories, including the Byram Pond Reservoir in the State of New York, the owners have settled with the City of New York for damages sustained by them by reason of the said proposed diversion, and the City has paid to them large sums of money as damages for interference with the natural flow of the said stream, to wit: upwards of $300,000, including the pond reservoir (fol. 169).

Witness EDWIN A. KNAPP for the complainants (fols. 170–224):

He is a real estate dealer in Port Chester, and has been acquainted with the valley of the Bryam river all his life. His father had a farm there. There was not very much difference in the relative size of the East and West Branches of the Bryam river just above their junction. So far as the Eastern Branch was concerned, the witness had "seen it almost entirely dry, just a little water percolating through the bed. This was at a point

over three miles above the junction. He had also noticed a *little* more water flowing through the Western Branch at times of extreme drought. He supposed that the flow of the West Branch "would fill at the dryest times a 6-inch water-main, perhaps; say from 4 to 6 inches." He had seen it in that condition during the summer months, during the period of his younger manhood, at intervals. He had seen it at times of extreme drought, when it would probably fill from a 4 to a 6 inch main. In the summer time he would say that the bed of the river below the junction of the East and West Branches would be not far from 25 feet wide, and at a time of extreme drought there would be water, perhaps, covering the whole of the surface, but just enough to cover it, but not with any considerable depth. He would judge the main Byram river below the junction in the spring or fall to be about 25 feet wide and on an average not far from 2 feet deep (fol. 177). The assessed value of Mr. Pine's farm on the assessment books of the town is $8,000 and of Mr. Muller's farm $2,500. The fair and reasonable value of Mr. Pine's farm is $15,000 (fol. 181, 182).

The average value of farm land along the Byram river in the vicinity of Port Chester is all the way from $100 to $150 an acre. Mr. Muller's place is used entirely for farming purposes, and Mr. Pine's is used in part for farming and also in part for getting out and manufacturing feldspar. Land in the neighborhood is mainly farming property. There are manufacturing interests there which have houses where the operators live. There are a few residential as distinguished from farming places. The witness' valuation of $15,000 is exclusive of the feldspar deposit and the feldspar mill. Assuming that along the line of Mr. Pine's land the flow of Byram river is decreased by the dam by one-fourth or one-third, the depreciation of Mr. Pine's property, in the witness' opinion, amounts to more than $2,000 (objected to, fol. 196).

The witness had never bought or sold a farm in the neighborhood in his life (fol. 206), nor owned any.

The witness thinks that the value of the property would be diminished about 30 per cent. by the taking of one-half to one-quarter of the water, although the old dam had detained the flow for sixteen years and did no injury. In the witness' opinion, during the extremely dry periods, the stream would be so diminished that to a certain extent it would be or perhaps might become a menace to the public health. It might injure the immediate surroundings of the place, and again it might not (fol. 210). "If you diminish the flow of the stream of water in front of a man's place, where the stream is the feature of the place, as is the case of Mr. Pine's, he having over 3,000 feet frontage, you certainly damage the property, in my judgment. * * * You detract from its attractiveness."

The Eastern Branch would supply water enough for ordinary domestic and household uses.

(Fol. 218) The diminished flow of water is a loss of more than $2,000 to Mr. Pine's farm. The damage that would come to Mr. Pine's property comes through the diminished flow of the stream. There is no other element of damage.

Witness DANIEL H. GRIFFIN for the complainants (fols. 229–239).

He owns property on the West Branch of the Byram river on the State line, about two hundred yards from the City dam and between four and five miles from the junction of the East and West Branches of the Byram river. About the middle of August, 1898, he found that there was no stream through his property. There had been a running stream. He had never found the stream dry prior to the construction of the dam. He

claims damages against the City for taking his property, and had talked with lawyers about it.

Witness LAWRENCE B. JENCKES for the complainants (fol. 260).

He is Superintendent of Public Works for the City of Stamford, and a civil engineer, graduating from the Sheffield Scientific School of Yale College in 1887. He had examined Mr. Pine's property on the 25th of May, 1899, and examined the water rights or privileges. The witness found at the lower end of Mr. Pine's land a pond held back by a dam about thirteen feet high, and at the head of that pond the Byram river flows through a rather steep valley, where a dam could be erected.

[*Note*—This was objected to by counsel for the City, as it appeared that Mr. Pine owned only one side of the river.]

The witness stated (fol. 267) that a dam could be erected at the head of the pond at the lower end of Mr. Pine's land with reasonable cost, which would throw the water back to the upper end of Mr. Pine's land. The dam would have to be about 10 feet high. The witness had never bought or sold or rented water power.

At folio 285 this question was asked of the witness:

"Now, Mr. Jenckes, assuming the case of a river "about 12 feet wide in which the average flow was "24,000,000 gallons per day through a valley of "a size which permitted, by the construction of a "dam, a pond of about half a mile long about 200 "feet wide, at the dam 12 feet wide, at the upper "end, being about 500 feet wide at its widest part, and "the fall at the dam being about 10 feet, can you, as a "civil engineer, state from these facts the horse-power "which could be developed at the dam, it being ad- "mitted that Mr. Pine only owns one side of the river."

"*A.* Yes, sir.

"*Q.* Now, will you state the horse-power?

"*A.* About 40 horse-power—I beg pardon (referring "to paper), 33 horse-power, that should be.

"*Q.* Now, is there known to the profession of civil "engineering a value to such horse-power?

"*A.* No definite value.

* * * * * *

"*Q.* Is there a known figure of cost of the production "of horse-power by steam?

"Objected to as irrelevant, incompetent and imma- "terial.

"*A.* It varies so at different points that I couldn't "give any definite answer.

(Fol. 291) "*Q* Have you made an estimate of the "cost of reproducing the 33 odd horse-power there "which you say could be determined from repro- "ducing it in steam?

"*A.* Yes, sir; * * * it would cost to produce "33 and a fraction horse-power by steam in a similar "plant to the one at present operated, about $1,080 a "year." * * *

(Fol. 300) Finding this estimate at five per cent. The amount would be about $21,000. Deducting $5,000 for the cost of developing the horse-power, the net result would be about $16,000.

If the assumed flow of 24,000,000 gallons per day were reduced to 16,000,000 per day, the net result would be about $10,000, or under the hypothetical conditions, a net loss of about $6,000.

[*Note.*—This appears to be the cost placed by the witness in his direct examination upon a steam-power equal to the water-power on the Pine property under

the hypothetical questions, and an attempt to show that the diminution in the flow would result in a loss of $6,000 to the value of the alleged water-power.]

On cross-examination this witness testified (fol. 311), that he had assumed that the dam had been built and had a right to remain there.

[*Note.*—It appears that Mr. Pine only owns on one side of the river, and the dam, if erected, would overflow land on the opposite shore belonging to others.]

(Fol. 315) "*Q.* Then you are assuming, are you not, "that the man operating the mill, or whatever you may "call it, has the legal right to shut that gate to a cer- "tain extent?

"*A.* Yes, sir.

"*Q.* A perfect legal right; then if he did not own "that legal title, and it was put to you as a hypothetical "question that he, the owner, did not possess that "right, your answer, of course, would be different?

"*A.* Yes, sir.

(Fol. 326) "*Q.* You have stated in your direct exam- "ination that you could not state the value of the "power, but could tell Mr. Marshall the cost to repro- "duce it; that is correct?

"*A.* Yes, sir.

"*Q.* You don't pretend to come here and state the "market value of a water-power or mill-power on that "river; that is to say, what it would bring in the mar- "ket between private individuals?

"*A.* No, sir.

"*Q.* Is it or is it not a fact that it might cost con- "siderable money to develop the power in a region "where there would be no market?

"*A.* Yes, sir."

* * * * * *

(Fol. 328) "*Q.* As an engineer, with the exception "of the water necessary to be furnished for the boilers

" at this feldspar mill, how would the deprivation of " the water of the Byram river affect running the mill?

" *A.* It would not affect it, with the exception of the " water for the boilers."

The feldspar mill is about 150 feet from the Byram river. The only water that is conducted to it is in a pipe for the supply of the boilers. The mill is not dependent upon the flow of the river for the purpose of creating power. The pipe is about one and a half or two-inch pipe. A donkey pump was used to pump the water through a two-inch pipe into the boilers, and that is the only use at the time the witness was there to which the waters of the Byram were put. The fall of the stream through the Pine property was 9.92 feet.

* * * * * *

(Fol. 336.) " *Q.* It is practicable at that particular " point to build a dam 15, 20 or 25 feet economically " to develop a greater amount of horse-power?

" Objected to unless confined to the lands of the " plaintiff.

" *A.* It is practicable; yes; it is possible; possible, " that is better.

" *Q.* Is the topography of the land such as to enable " one to do that, at that point, at the foot of the little " valley to which you have referred?

"*A.* Yes.

" *Q.* Then it would be, in your opinion, practicable to " develop a considerable horse-power at the foot of " that little valley you have referred to?

"*A.* I couldn't say as to the practicability of it with- " out looking into it further."

[*Note.*—We think the witness failed to show a water-power on Mr. Pine's land of any value.]

Witness NEWTON S. JOHNSON, for the complainant (fol. 339).

He has lived on Mr. Pine's place seven years, and Mr. Pine is his father-in-law. He looks after the feldspar mill. Mr. Pine's farm consists of 106 acres. The waters of the Byram river he uses for feeding the boiler and also for household purposes, and the pasture lots lie on it. The stock kept on the Pine farm consists of six head of horned cattle, and five or six horses. The witness had never seen the waters of the Byram river so low that cattle could not get enough to drink. There is a well on the property which is used for drinking water. Nearly every winter water is taken from the river and carried for the cattle. The cattle were watered from the river at the extremely dry times. The river has nothing to do with the feldspar plant, except for furnishing water for the boiler. It is an 80-horse boiler. A donkey pump or injector is used for taking water from the cistern for the boiler, and there has always been water enough for that. The plant is run by steam.

Mr. Johnson, being recalled, testified (fol. 358), when certain photographs, taken August 31, 1899, were introduced; there is a pond, the size and depth of which the witness describes (at fol. 362), formed by damming the Byram river, and Mr. Pine owns on one side of that pond.

Witness SAMUEL VAIL, for the complainant, testified (fol. 374):

He is the engineer of Mr. Pine's feldspar mill. Taking it on an average the year round there wasn't a great deal of difference in the flow of the water between the East and West Branches. The feldspar mill has not been running every day, but only when it had work to do. The mill is run by steam, and the only use made of the waters of the Byram river by it is to feed the boilers, for which purpose there has so far been water enough.

(Fol. 386.) Certain Connecticut statutes were offered in evidence subject to objection, to wit:

An act to encourage the erection and support of water power manufactories.

Chapter 26, Public Act of Connecticut, 1863 and 1864; affirmed July 6, 1864.

General Statutes of Connecticut, 1875, chapters 472, 473, 474.

General Statutes of Connecticut, 1880, chapter 92.

General Statutes of Connecticut, 1875, chapter 234, section 18.

General Statutes of Connecticut, Revision of 1887, in force January 1, 1888, sections 1216 to 1225, and section 2687.

It was stipulated under objection (fol. 387) that if Lawrence B. Jenckes were recalled he would testify that he assumed the average flow of 24,000,000 gallons per day, or 1,000,000 gallons per hour, and that power would only be used ten hours a day, as in ordinary manufacturing, and that sufficient pondage could be obtained to maintain a flow of 1,000,000 gallons per hour for ten hours, or 10,000,000 gallons per day.

COMPLAINANTS' TESTIMONY CLOSED.

A motion was then made (fol. 390) to dismiss the complaint and all the proceedings taken thereunder, on the ground that there is an improper joinder of parties; and on the further ground that no damage whatever has been proven; on the further ground that the plaintiff has not proven irreparable damages and that the City of New York is adequately responsible and able to pay any monetary damages.

*Testimony for the defendants was then taken.*

The complainants were recalled and testified as stated above.

[*Note.*—Neither of them testifies to any injury from the diversion.]

FREDERICK K. BETTS, called for the defendant (fol. 398):

He is an assistant engineer of the Department of Water Supply of the City of New York, and is stationed at Kensico, about two and a half miles from the Byram river. He has made surveys of that river, and is perfectly familiar with it. The City of New York has built a dam within the State of New York on the West Branch of the Byram river. The witness kept the flow of water for one summer at the point where the dam is located; that is, of the West Branch only. Gaugings were taken from June to December, in 1895, a dry summer. The witness then states the average daily flow of the river. For the 18.22 square miles it would average over 1,000,000 gallons per day. During the entire summer of 1895 there were just ten days when the flow was less than 1,000,000 a day. The very least flow recorded for any day, and that for one day only, was 462,296 gallons (fol. 405), and that was in the month of September.

The witness then testifies as to the amount of rainfall in certain months. The average rainfall, based on sixteen years' observation, is 47.93 inches per year. The dam was completed by the City in 1896. In 1895, when the gaugings were taken, the City was excavating for the reservoir there. The drainage area diverted by the dam is 8.66 square miles.

The City is diverting water from an area of 8.66 square miles. The witness' memorandum is upon the

basis of the flow from the drainage area of 8.66 square miles (fol. 407). "The area of the East Branch, of all "the Byram river above Pine's, exclusive of the diverted "area, I measured to be 18.22 square miles.

"*Q.* That is what I asked you; then you are not at "the present time, and never have been, diverting any "part of the 18.22 below the dam built by the City?

"*A.* We have no means of diverting it" (fol. 432).

NATHAN J. HUGHES testified for the defendant (fol. 434):

He is pumping engineer for the Village of White Plains. The capacity of the cistern out of which water is taken by Mr. Pine for the boiler up to the level of the brook is 1,700 gallons. That is what it will hold. A canal leads from the river to the cistern and a pipe connects the cistern with the boiler. Assuming that the boiler is an 80-horse-power boiler, it would take 285 gallons per hour of water to supply it running under full head.

WILLIAM L. BANKS, testified for the defendant (fol. 438):

He has bought and sold real estate in large quantities in the neighborhood and is familiar with the Byram Valley and qualified as an expert. He described Mr. Pine's farm as follows (fol. 441): "It is "rather a rough farm, not much level land and a part "of it along the river; the southerly part of it is rock "or rock cropping out covered with a thin soil; the "northerly part along the bed of the river is more "smooth and more productive; the westerly part is "hilly, sloping to the east, most of it; there is some "good land on the westerly part of it."

He visited the farm December 3, 1899. He found the water running over a bed about 20 feet in width

and an average depth of 6 inches. There was then water enough for the uses of the farm. He values the Pine farm at $10,000, and testifies (fol. 444) that the diversion of the water has not decreased the value of the farm, in his judgment, at all.

He describes Muller's farm as follows (fol. 445):

"His farm, the easterly portion of it, is a smooth "bottom land along the valley of the Byram river; he "owns on both sides of the river; the westerly part of "it is meadow and more hilly and some rock; the "house stands back from the road and a lane leads up "to it; the buildings are in fair condition; there is a "good orchard at the northerly part—a very good "small farm."

On December 3, 1899, there was water in the West Branch of the Byram river flowing in the old bed of the West Branch then. The witness estimates the Muller property as worth from five to six thousand dollars, not to exceed $6,000 (fol. 447). The diversion of the waters does not affect its value. "There is suf- "ficient water for all purposes in the river and in the "little stream that runs through it into the river "also" (fol. 447). Eliminating that stream entirely there is sufficient water there for all purposes. There was about half of the quantity of the East Branch (fol. 448). At folio 479 the witness, on cross-examination, testifies again, "in my judgment his (Mr. Pine's) "property has not been damaged by reason of what "water has been taken; it has not been increased, "however." Assuming that the City has diverted 7,000,000 or 8,000,000 gallons of water, one-third of the stream, Mr. Pine's property is not affected thereby for any purpose that the witness knows of at present, or for the future, that he can conceive.

If it were possible to make a pond on Mr. Pine's land the decrease in the flow of water would be a loss and damage to him as a land owner (fol. 483).

WILLIAM H. HOYT was called for the defendant (fol. 500):

He is a real estate dealer and agent of thirty-one years' experience. He described the Pine farm (at fol. 506) as "an ordinary farm for that section of the country; it is "what I regard as a rough farm * * * ; I mean that "the predominant acres of the farm are very rough "pasture and woods." He owns on one side only of the river. "He has no road front except by right-of-way "over the bridge across the river."

Mr. Hoyt regards the 44-acre Muller farm as a very good farm (fol. 507). "Principally the majority of the "farm is meadow and bottom, also tillable land, about 5 "acres of wood and rough pasture." Witness testifies (at fol. 510) that so far as he can judge, the diversion by the City of the waters of the West Branch of the Byram river makes no difference to the value of the property. "There "is a great abundance of water, a great surplus of water, "so far as the necessities of the farm is concerned" (fol. 512).

He values the Pine property at "$9,000, or $90 an acre" (fol. 513). When asked how far the farm was from the nearest railroad station he said that it was about four miles from Portchester and about the same distance from Greenwich. The farm is in a cheap neighborhood and does not give evidence of having been kept up in a good state of cultivation.

The witness valued the Muller property at $6,600. When asked (at fol. 514) what difference in value, if any, has been caused by the City diverting the waters of the West Branch of the Byram river, he answered, "I "think no difference." There was "abundance of water

"and for forty more farms like it." The diversion of all the water of both the East and West Branches would diminish the value of the land (fol. 519). Whether if the water was diverted to the extent of one-half the land would be damaged, "would depend entirely upon "the uses to which the water is put and the demand "for it" (fol. 520).

CHARLES L. AUSTIN, called as a witness for the defendant (fol. 528):

He is a real estate dealer in Portchester. He testified that there was plenty of water on the farm for all farming purposes.

J. HENRY CLARK, called as witness for the defendant (fol. 536):

He testified that he had known the Byram river in the neighborhood of the Pine and Muller property for about sixty years and was a farmer. He calls the Pine farm a "fairish sort of farm; it is pretty rough * * *; "plenty of water by it apparently." There was water flowing by the Muller property coming down the West Branch of the river; very nearly as much as the East Branch. There was plenty of water for all ordinary household, domestic and farm uses on these two properties. More than could be used for farm uses. "Enough water there, I should judge, to water 500 "head of cattle, flowing down that river now."

GEORGE W. BIRDSALL, recalled for the defendant (fol. 542):

He testified that portions of the Twenty-third and Twenty-fourth Wards of the City of New York were supplied with water from the Bronx, Byram and Rye ponds, and that about 125,000 people were dependent upon that supply for their water. About 7-20ths of

the supply for these 125,000 people is furnished by the waters of Byram river, and about the same amount of water for fire protection in the Twenty-third and Twenty-fourth Wards. Certain portions of the Twenty-third and Twenty-fourth Wards are supplied solely from the Byram supply.